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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 817

JUNIUS IRVING SCALES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Junius Irving Scales, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on October 6, 1958.

Opinion Below

The opinion of the court below (Appendix A, *infra*, pp. 31-81) has not yet been officially reported. The opinion of the court below affirming the judgment of conviction after petitioner's first trial under this indictment is reported at 227 F. 2d 581, and the opinion of this Court reversing that judgment is reported at 355 U. S. 1.

Jurisdiction

The judgment of the Court of Appeals was entered on October 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

The Court of Appeals for the Fourth Circuit affirmed a judgment of the District Court of the United States for the Middle District of North Carolina, entered upon a jury verdict under an indictment, finding the petitioner guilty under the so-called "membership clause" of the Smith Act (Act of June 28, 1940, 18 U. S. C. 2385), proscribing membership in any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of the Government of the United States by force or violence, with knowledge that the purposes of the group of persons are such. It is not disputed that the petitioner was a member of the Communist Party during the three-year period prior to the indictment. The questions are:

1. Whether the "membership clause" of the Smith Act is unconstitutional (a) on its face, or (b) as applied to the facts of this case;

2. Whether the indictment charges an offense under the laws of the United States, in view of Section 4(f) of the Internal Security Act of 1950 (50 U. S. C. 783(f)), which provides that neither the holding of office nor membership in any Communist organization shall constitute *per se* a violation of that or any other criminal statute;

3. Whether the evidence was sufficient to support the judgment of conviction under the Smith Act in accordance with the standards prescribed in *Yates* v. *United States*, 354 U. S. 298 and other decisions of this Court; and

4. Whether, in four particular and important respects, petitioner was denied a fair trial.

Statutes Involved

The relevant provisions of the Constitution of the United States, the Smith Act, the Internal Security Act of 1950, the Communist Control Act of 1954 (50 U. S. C. 841), the Act of September 2, 1957 (18 U. S. C. 3500), and the federal statutes governing the qualifications and empanelling of jurors (28 U. S. C. 1861, 1864) are set forth in Appendix B, *infra*, pp. 82-89.

Statement

The petitioner has not been accused or convicted of helping to organize the Communist Party, of advocating the overthrow of the United States Government by force and violence, or of conspiring for such purposes. He has not been accused or convicted of any *act* whatever, other than being (or, more accurately, not ceasing to be) a member of the Communist Party.

The indictment (P. A. A2),[1] returned November 18, 1954, charges that the Communist Party is and has since January 1946 been a group of persons who advocated overthrowing the United States Government by force and violence; that Junius Irving Scales is and has since January 1946 been a member of the Communist Party; that he knew the Party to be a group of persons who advocated violent overthrow; and that he intended "to bring about such overthrow by force and violence as speedily as circumstances would permit."

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[1]References designated "P. A." are to the Appendix to petitioner's brief as appellant in the court below; those designated "G. A." are to the Appendix to the Government's brief below; those designated "Tr." are to the trial transcript; and those designated "G. Ex." are to the Government's exhibits.

The petitioner was first tried in April 1955. He was found guilty and sentenced to imprisonment for six years. That judgment was affirmed by the Court of Appeals for the Fourth Circuit in November 1955, 227 F. 2d 581. This Court granted certiorari, 350 U. S. 992, and heard argument on the constitutional and statutory questions in October 1956. In June 1957 this Court ordered the case restored to the docket for re-argument, 353 U. S. 979. On October 14, 1957, before the case was reached, the Court entered a further order, 355 U. S. 1, reversing the judgment on the authority of *Jencks* v. *United States*, 353 U. S. 657.[2]

After re-argument and denial of a motion to dismiss the indictment, the petitioner was tried again in February 1958. It was conceded by the prosecution, and the trial court so charged (P. A. A36), that Scales' conduct alleged as criminal had to be committed between November 18, 1951 and November 18, 1954, the three-year period preceding the indictment. It was acknowledged by Scales, and the trial judge so informed the jury (P. A. A41), that he was a member of the Communist Party within the statutory period.

The prosecution called as witnesses eight ex-Communists, of whom two were *bona fide* and six were Federal Bureau of Investigation informants. Five described Communist Party teachings and activities as known to them, but their testimony did not touch the appellant or Communist activities in the Carolinas. Three had known the appellant as a Party member in North Carolina.

In the former category, the most important witnesses were John Lautner and Barbara Hartle. Lautner, a paid

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[2]This Court made the same disposition of a companion case from the Court of Appeals for the Seventh Circuit, *United States* v. *Lightfoot*, 355 U. S. 2, reversing 228 F. 2d 861. In September the Solicitor General had filed with the Court a memorandum in both the *Scales* and *Lightfoot* cases, confessing error under the *Jencks* case.

consultant for the Department of Justice, had left the Communist Party in January 1950, nearly two years before the limitations period. He identified books and publications used in Communist Party schools, and testified that in such schools in New York City he was taught in 1930 and 1941, and he himself taught in 1947 and 1948, that the ultimate goal of the Communist Party in the United States was "to bring about a fundamental change in the economic, social and political structure of capitalism" (G. A. 105). He testified (G. A. 106) that this change "cannot be achieved peaceably" but "will come and can come as a result of force and violence on the part of wresting power [*sic*] from the capitalist class in this country."

Mrs. Hartle was a member of the Communist Party from 1933 to 1954. Between 1938 and 1946 she had attended two national Party conventions and a Party school in or near New York City, and she was a paid Party official in Seattle from 1940 to the middle of 1950. She testified that during that period she had taught and been taught that the ultimate goal of the Communist Party was "the dictatorship of the proletariat," and that this goal could only be attained "forcibly" (G. A. 230-31).

Both Lautner (G. A. 106-07) and Mrs. Hartle (G. A. 233-34) testified that they had taught and been taught that the Communist goal might be attained at an unspecified future time when the necessary "subjective and objective conditions" would be in existence. Three other witnesses who had joined the Communist Party as paid informants for the F. B. I. also testified about the teaching of the necessity of force and violence as a means of achieving the Party's objectives, as they had observed such teaching in Party schools in Chicago in 1945, in St. Louis in 1947, and in Los Angeles in March, 1951.

None of these five witnesses testified to any acquaintance or contact with or knowledge of the appellant, or to any

knowledge of his or of any Party activities in the Carolinas. Most of this testimony was received over defense objection on the grounds of incompetence, irrelevance, and lack of connection with the defendant. A motion to strike the testimony of all these witnesses was denied (Tr. 1828).

The prosecution's leading witness from North Carolina was one Clontz, who by pre-arrangement with the F. B. I. made contact with Scales in 1948 and joined the Communist Party in 1950. Two of Clontz' conversations with Scales (G. A. 246-47 and 263-64) were heavily relied on by the prosecution to show Scales' personal knowledge of the Party's advocacy of force and violence. These talks and all of Clontz' contacts with Scales took place before the statutory period of limitations, as the two did not meet again after September, 1951 (Tr. 1111 and 1128).

Clontz also identified several books and pamphlets received by him from Scales (P. A. A7-A14 and A18-A23; G. A. 310-13; Tr. 1794-1827; G. Exs. 64, 65, and 66) which condemned American conduct of the war in Korea. The prosecution offered these documents to show Communist Party incitement of action, in an effort to meet the requirement laid down by the Supreme Court in the *Yates* case, *supra*. This evidence, some of it highly inflammatory (*infra*, pp. 24-25), was admitted over objection, extracts were read to the jury, and the ensuing defense motion for a mistrial was denied (P. A. A18-A23).

The prosecution witnesses Reavis and Childs were also F. B. I. informants and members of the Communist Party in North Carolina. Childs testified about his attendance at a week-long Party school session held in August, 1952 near Winston-Salem, and described (G. A. 433-42) the various types of activity he was directed to engage in as a member of the Party, including writing letters to Senators, signing petitions, distributing leaflets, and obtaining the

"ingredients" for mimeographing. Neither Reavis nor Childs testified to any statement or act by Scales or in his presence indicating that Scales personally intended to overthrow the Government by force and violence, that he knew the Party's aims to be such, or that in fact they were such.

The petitioner did not testify. The defense called nine witnesses who knew Scales during the period that he was a member of the Communist Party, and testified in support of his character and conduct. These included two clergymen, a radio station employee, a professor at the University of North Carolina, a Greensboro businessman, a textile mill worker, the wife of a Superior Court judge, and the petitioner's mother and aunt. None of them had heard the petitioner advocate force and violence, and several of them testified to his statements and attitudes, heard by and known to them, which were inconsistent or incompatible with such advocacy.

In line with the *Yates* case, *supra*, the trial judge charged the jury (P. A. A38-A40) that the advocacy of force and violence punishable under the Smith Act is not mere advocacy of belief in violent overthrow of the Government, but must be advocacy of such a nature "as would reasonably and ordinarily be calculated to incite its [the Communist Party's] members to take concrete and forcible action for such overthrow . . ." However, the court refused to charge, as requested by the defense (P. A. A33-A34), that the Smith Act does not prohibit incitement of action specifically protected by the Constitution, such as speeches, leaflets, petitions to public officials, and other recognized means of public persuasion, unless those means are used to advocate the violent and forcible overthrow of the Government. Thus the jury was left free to consider, as evidence of unlawful incitement, the literature dealing with the Korean War and other evidence which was highly

prejudicial but wholly irrelevant to the issue of action-inciting advocacy of force and violence.

The jury found the petitioner guilty, and the trial judge again imposed a prison sentence of six years (P. A. A49).[3] Affirming the judgment of conviction, the Court of Appeals sustained the constitutionality and applicability of the membership clause (Appendix A, *infra*, pp. 33-40) on grounds similar to those invoked upon the previous appeal (227 F. 2d 581, 586-89). The court found no merit in the petitioner's other points, and rejected, expressly or *sub silentio*, his new contentions that the standard of proof of unlawful incitement prescribed in the *Yates* case had not been met, that the membership clause (assuming its intrinsic validity) had been unconstitutionally applied in this case, and that the indictment was fatally defective under the prosecution's new theory that the membership clause applies only to "active" membership.

Reasons for Granting the Writ

This case was the first under the "membership clause" to reach this Court. Two of the questions then presented—the intrinsic constitutionality of the clause and the effect of Section 4(f) of the Internal Security Act—are inherent in any prosecution under this provision of the Smith Act. In reviewing petitioner's first conviction the Court left these issues unresolved, and they are now presented not only in this petition but also in at least fourteen other cases pending in the lower federal courts.[4] The importance of

[3] Inasmuch as the maximum penalty for a conviction of conspiracy to violate the Smith Act was five years until the Act was amended in July 1956, Scales' sentence is heavier than has been imposed on any other Smith Act defendant.

[4] *United States* v. *Noto*, No. 25156 in the Court of Appeals for the Second Circuit; *United States* v. *Hellman*, pending in the Court of Appeals for the Ninth Circuit; *United States* v. *Lightfoot*, cal-

these questions of constitutional and federal statutory law is clear, as is the desirability that they be settled by this Court.

Furthermore, this case now comes here with new issues and old ones sharpened, as a result of the prosecution's attempt to meet the standards of essential proof under the Smith Act, as set forth by this Court in the *Yates* case. For this purpose the prosecution offered new "evidence," the admission of which was erroneous and highly prejudicial (especially in conjunction with the charge to the jury) and renders the membership clause plainly unconstitutional as applied in this case. For the same purpose, the prosecution sought to add to the offense new elements that are specified in neither the Smith Act nor the indictment. In spite of all these efforts, the proof wholly failed to meet the "action-inciting" requirement reiterated and applied in the *Yates* case.

1. *Under the First and Fifth Amendments the Membership Clause is Unconstitutional on its Face.* This case presents important non-constitutional questions the disposition of which, we believe, will in any event require a reversal. But if the Court should hold otherwise, or for some other reason should determine to pass on the constitutionality of the "membership" clause under which the petitioner was convicted, then the clause must be held invalid under the First and Fifth Amendments.

Since the Smith Act restricts the rights of free speech, press, and assembly safeguarded by the First Amendment,

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ordered for retrial as No. 54-CR262, N. D. Ill. E. D.; *United States* v. *Blumberg*, pending on motion for new trial, E. D. Pa.; *United States* v. *Russo*, D. Mass.; *United States* v. *Weiss*, N. D. Ill.; *United States* v. *Dennis*, No. C128/89; *United States* v. *Winter*, No. C128/98; *United States* v. *Gates*, No. C128/89; *United States* v. *Davis*, No. C128/93, and *United States* v. *Stachel, Hall, Foster*, and *Thompson*, all in the Southern District of New York.

this Court has been careful to specify the factors that are held to justify Congressional limitation of those rights. *Yates* v. *United States, supra; Dennis* v. *United States,* 341 U. S. 494. In both of these cases the defendants were charged with conspiracy to violate the advocacy and organizing paragraphs of the Smith Act, and it was in the power of a *conspiracy* that this Court, in the *Dennis* case, found a sufficiently "clear and present danger" to justify the statutory prohibition, saying (341 U. S. at 511): "It is the existence of the conspiracy which creates the danger."[5]

Another critical ingredient in the constitutional foundation of the Smith Act is *advocacy,* as distinguished from mere discussion. In the *Dennis* case the Court laid great emphasis on the constitutional importance of this distinction (341 U. S. at 502).[6] In the *Yates* case, avoiding (354 U. S. at 319) "a constitutional danger zone so clearly marked," the Court construed the Smith Act as limited to advocacy which incites the hearer to take action—"to *do* something, now or in the future, rather than merely to *believe* in something"—directed toward the violent overthrow of the government.

But these crucial elements of conspiracy and action-inciting advocacy are quite lacking in the charge against the petitioner. There is no accusation of conspiracy, or of concert of plan or act with any other person. It is not charged that the petitioner ever heard anyone advocate violent overthrow of the government, much less that he himself ever engaged in such advocacy. The indictment charges nothing more than a state of mind comprising knowledge

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[5]See also the late Justice Jackson's concurring opinion (341 U. S. at 577): "There is no constitutional right to 'gang up' on the Government."

[6]See also Justice Frankfurter's concurring opinion (341 U. S. at 545): "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken."

and intent,[7] manifested in the external world by membership in the Communist Party. Such a charge wholly fails to satisfy the requirements stated in the *Dennis* case.

In essence, the membership clause seeks to hold a "member" of a group criminally liable for the group's "advocacy," whether or not the member participated in the advocacy. A co-conspirator or joint participant in a felony may be held liable for the acts of others, but it has not yet been held under our Constitution that "membership" is a form of association which warrants holding one member criminally responsible for the acts of others.[8] Such a statute is a flagrant abridgement of freedom of speech and assembly, denies due process of law by the unwarranted imputation of guilt, and is void by every criterion of the First and Fifth Amendments.[9]

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[7]In the *Dennis* case, the Court also specified (341 U. S. at 499-500) *personal intent* to overthrow the Government as a constitutionally essential element of the Smith Act, despite the fact that the Act expressly requires such intent only in the "distribution" paragraph, and not in the "advocacy" and "organizing" paragraphs (Appendix B, *infra*, pp. 82-83). The membership clause specifically requires "knowledge" of the group's violent purpose, but does not mention "intent." Therefore it is difficult to justify reading "intent" into the clause, which is thus rendered constitutionally deficient on this ground alone. An allegation of "intent" is included in the indictment, but of course this surplusage does not cure the defect. *Thornhill* v. *Alabama*, 310 U. S. 88.

[8]There is no constitutional support for the clause in *Bryant* v. *Zimmerman*, 278 U. S. 63, recently discussed in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 465-66. The New York statute involved in the *Bryant* case does not suppress or penalize membership in the societies to which the law applies. It is a registration measure applicable to certain societies bound by secret oaths, and its sanctions are directed not at membership, but at failure to register.

[9]John Lord O'Brian, *National Security and Individual Freedom* (1955), at pp. 27-28:

> "The Smith Act of 1940 *made it unlawful* for any person to be or to become a member of or affiliate with any society, group, or assembly which teaches, advocates, or encourages the overthrow or destruction of any government in the United

The court below sustained the constitutionality of the membership clause by resorting to alchemy (Appendix A, *infra*, p. 37): "The membership clause is of course nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence." But the clause is both more and less than, and very different from, a statute so described.[10] A conspiracy charge requires more than one conspirator;[11] the indictment here does not charge conspiracy and names no other conspirator. Under the federal conspiracy statute overt acts must be alleged; the indictment lists none. Conviction for conspiracy depends upon proof of an *agreement* among the conspirators to accomplish an unlawful act or employ unlawful means. See *United States* v. *Falcone*, 311 U. S. 205, 210; *Direct Sales Co.* v. *U. S.*, 319 U. S. 703, 713; *Mulcahy* v. *Regina*, L. R. 3 H. of L. 306, 317 (1868). But the charge against Scales covers no agreement or plot of any kind.

It is true that in the opinion of this Court in *Whitney* v. *California*, 274 U. S. 357, 371-72 the California criminal

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States by force or violence. The statutes, therefore, imported into our law the alien doctrine of guilt by association, which up to this time had been regarded as abhorrent and which had never been recognized either by the courts or by the Department of Justice, even during the perils and excitements of the First World War."

[10]Apart from the matters mentioned in the text, neither the membership clause nor any other part of the Smith Act proscribes "a conspiracy to overthrow the government" (an offense covered by a statute nearly a century old, now 18 U. S. C. 2384), but rather *advocacy* of governmental overthrow, whether orally or by the printed word. More important, the lower court's treatment of the membership clause renders it indistinguishable from the other provisions of the Smith Act, and therefore cannot possibly be sustained on elementary principles of statutory construction.

[11]See *United States* v. *Rabinowich*, 238 U. S. 78, 88; Pulton, *De Pace Regis et Regni* (London, 1615) pp. 232-33. Of course a single conspirator can be indicted, but the charge must involve one or more co-conspirators.

syndicalism statute, proscribing membership in or the organization of such groups, was described as partaking "of the nature of a criminal conspiracy." But the defendant in the *Whitney* case was not, as is the petitioner here, indicted for membership alone. In Mr. Justice Brandeis' concurring opinion (in which Mr. Justice Holmes joined) it is pointed out (274 U. S. at 379) that the defendant there had failed to challenge the California statute under the "clear and present danger" test, and that there was evidence linking her with "a conspiracy . . . to commit present serious crimes" quite distinct from advocacy. Justice Brandeis went on to point out the difference between a "membership" charge and a "conspiracy" charge, and indicated that, if the constitutional issue were properly raised, the California "membership" clause should be held void (274 U. S. at 372-73, 379):

> "The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.
>
> ". . . I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. . ."

The Government has long since conceded[12] that the membership clause, as written in the statute, can not be upheld, and has sought to salvage the clause by limiting its application to "active" or "high-level" membership in "tightly disciplined, quasi-military, deeply conspiratorial" organizations. How such a technique of statutory construction can be justified, how the clause so construed could withstand constitutional challenge for vagueness, or how an indictment lacking so many elements now deemed essential to the offense could survive, we do not know. Passing all this, the addition of "activity" as an element of the crime would not save the constitutionality of the clause; the five defendants whose acquittal was directed by this Court in the *Yates* case (354 U. S. at 330) had been exceedingly "active" in the Communist Party.

The prosecution's inescapable dilemma in this case is that the membership clause could be "assisted" to constitutionality only by reading into it elements—action-inciting advocacy, conspiracy—which would reduce it to surplusage indistinguishable from the rest of the Smith Act, and which would invalidate the indictment for failure to specify essential elements of the offense. Where, as here, there is no charge of unlawful activity or conspiracy, the statute can not be upheld. *Cf. Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Konigsberg* v. *State Bar*, 353 U. S. 252.

2. *Under the First, Fifth, and Sixth Amendments, the Membership Clause is Unconstitutional as Applied in this Case.* Certain documentary evidence received during petitioner's second trial was avowedly selected and offered by the prosecution (P. A. A10-A14) in order to meet the

[12]See the Solicitor-General's "Supplemental Memorandum for the United States on Reargument" in the *Scales* and *Lightfoot* cases, Nos. 3 and 4, October Term, 1957, p. 3, and his brief on the merits in the *Scales* case, No. 29, October Term, 1956, pp. 41-45.

"action-inciting" requirement laid down in the *Yates* case, which was decided while petitioner's first conviction was under review on certiorari. These documents, received over objection and read to the jury (P. A. A18-A23), were printed books and pamphlets embodying violent attacks (e.g, the extract quoted *infra*, pp. 24-25) on American policy and conduct of the fighting in Korea. The prosecution displayed these to the jury as specific proof of Communist Party incitement "to action" (P. A. A24).

But of course the *Yates* case standard of proof is not satisfied by proof of incitement to action of any kind, but only (354 U. S. at 312, 320) by proof of incitement to "concrete action for the forcible overthrow of government." Repellent as the documents in question may be, they are wholly unrelated to forcible overthrow. The court below thought the evidence relevant as showing (Appendix A, *infra*, p. 65) an intent "to blacken the United States and stir up animosity against it and thus weaken its ability to defend itself should a revolution be attempted." The grave dangers of such a view are easily perceptible. There are several issues dividing our country today, involving arguments and accusations that may well "blacken" and "stir up animosity against" the government. If the projection of such arguments in published form may now be taken as evidence of incitement to action for overthrowing the government by violence, there is little substance left in the First Amendment.

The defense requested a jury charge (P. A. A33-34) that the publication of unpopular opinions on issues of government policy does not, without more, constitute "action for the forcible overthrow of government." The prosecution objected, the court refused the instruction (Tr. 1926 and 1937), and the jury was thus left free under the charge to find that the ultimate fact required by the *Yates* case—action-inciting advocacy—had been established by

the Korean documents alone, in accordance with the prosecution's closing summation to the jury (P. A. A24).

If it be the Government's theory[13] that the use of speech, press, and assembly to oppose American involvement in Korea is lawful *per se*, but becomes evidence of crime if the auspices are those of the Communist Party, it is sufficient to say that this view was unanimously rejected by this Court in *De Jonge* v. *Oregon*, 299 U. S. 353, holding the Oregon criminal syndicalism law unconstitutional as applied to the charge in that case. No more can the Smith Act be constitutionally applied to punish membership in the Communist Party on the basis of publications such as the prosecution relied on in this case.[14]

As applied in this case, the membership clause is likewise unconstitutional under the Fifth and Sixth Amendments. At the prosecution's request and over defense objection[15] the court charged (P. A. A41) that for mem-

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[13]See P. A. A12-13, where prosecution counsel, referring to comparable documents offered (but excluded) for the same purpose, described them as "preparatory action . . . directed towards the ultimate aims of the Party." Of course, the five defendants acquitted in the *Yates* case had engaged in a great deal of such action (354 U. S. at 330), which nevertheless was held quite insufficient as proof of violation of the Smith Act.

[14]The book "I Saw the Truth in Korea" (G. Ex. 66, P. A. A20-A22) was singled out in the prosecution's summation as proof of incitement (P. A. A24) but, in addition to the Korean documents, an enormous amount of irrelevant and prejudicial evidence—particularly third-party declarations about matters remote from the petitioner in time and place—was received. Under so loose an evidentiary practice, the bounds of the Smith Act become so vague and far-reaching as plainly to trespass on both the First Amendment and the due process clause of the Fifth Amendment. *Winters* v. *New York*, 333 U. S. 507, 519-20.

[15]P. A. A47-48. In part the charge embodies the language suggested by the Solicitor-General in his "Supplemental Memorandum on Reargument" in No. 3 and 4, October Term 1957, pp. 6-7. Curiously enough the prosecution, having persuaded the trial judge to give the charge although he regarded it as out of place (Tr. 1934), subsequently informed the Court of Appeals (Govt. Brief p. 34) that this instruction was "unnecessary."

bership in the Communist Party to be criminal it must be "active," involving "all, or a substantial part" of petitioner's "time and efforts." This is fatally vague as a standard of guilt, under such cases as *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. Furthermore, no charge of "activity" is specified in the indictment, which is thus rendered constitutionally defective, for want of essential allegations.[16] *United States* v. *Carll*, 105 U. S. 611; *Morisette* v. *U. S.*, 342 U. S. 246; *United States* v. *Lamont*, 18 F. R. D. 27 (S. D. N. Y.), aff'd. 236 F. 2d 312 (C. A. 2). The indictment was in substance amended, not only by the addition of the element of activity but also by the Court of Appeals' action in treating it as a conspiracy indictment (Appendix A, *infra*, p. 37), in violation of the rule long since laid down in *Ex parte Bain*, 121 U. S. 1.

3. *Section 4(f) of the Internal Security Act Bars the Prosecution of Communist Party Members and Officers under the Membership Clause.* In any prosecution of a Communist Party member under the "membership clause," the question of the effect of Section 4(f) of the Internal Security Act of 1950 is posed *in limine*. For if Section 4(f)

[16]The court below brushed off this argument on the ground that the petitioner was not prejudiced by the instruction. But the defense objected to the instruction as prejudicial (P. A. A47-48), and the Court of Appeals' own opinion is ample evidence of the confusion to which the instruction may give rise (Appendix A, *infra*, p. 41): "This instruction [i.e. on "active" membership] was completely in harmony with the view expressed by the Supreme Court that the Smith Act contemplates not merely the advocacy of a theory of government but the advocacy of concrete action of an unlawful character." Of course, the *Yates* case expressly holds (354 U. S. at 330-331) by its acquittal of the five defendants who were very active functionaries, that Party activity is not evidence of action-inciting advocacy. Furthermore, although a defective indictment which is not challenged prior to trial will be upheld unless the defendant was prejudiced, this is not true where (as here) the indictment is challenged as insufficient prior to trial. *Cf. Hagner* v. *United States*, 285 U. S. 427.

is given the effect that logical analysis requires and legislative history supports, it is a bar to such prosecutions.

Section 4(f) provides that neither Communist membership nor office-holding "shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." The court below, relying on the phrase "per se," held (Appendix A, *infra*, pp. 39-40) that Section 4(f) does not apply to Communists "who hold membership in the organization with guilty knowledge of its criminal purpose to bring about the violent overthrow of the government." Such membership is not "mere" (i.e. "per se") but "with knowledge", and this added element removes it from the scope of Section 4(f).

The effect of this construction, obviously, is to limit Section 4(f) to Communists who do *not* have the stipulated knowledge. But this is wholly incompatable with the structure and purpose of the Internal Security Act in general and Section 4(f) in particular.

Section 2 of the Internal Security Act (50 U. S. C. 781) embodies a "Congressional finding" that (paragraphs 6 and 15) the Communist movement in the United States is "an organization . . . rigidly and ruthlessly disciplined . . . seeking to advance a movement when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement . . ." Section 4(a) of the Internal Security Act makes it a crime "knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . under the domination or control of any foreign government . . . organization . . . or . . . individual." Sections 7 and 8 of the Act (50 U. S. C. 786-87) provide for compulsory registration, under severe criminal penalties for failure, of Communist organizations and members.

Especially in view of the "Congressional finding" in Section 2, it is obvious that the registration provisions raise serious questions of self-incrimination for Communist members under Section 4(a). It was in order to deal with this problem that subsection (f) was added to Section 4, as the legislative history indisputably shows,[17]

Now, it is perfectly clear that, whatever may be held to be the legal effect of Section 4(f), its purpose would be entirely frustrated by confining its scope in accordance with the decision below in this case. For the lower court's construction would exclude from its coverage all Communists who know the objectives of the Communist organization as found by Congress in Section 2 of the Act. The inevitable consequence of the decision below is that Communists who know the Congressionally-found purpose of their organization are given no immunity under Section 4(f) and may plead the privilege against self-incrimination to avoid compliance with the registration provisions, which thus would be binding only on Communists who do *not* know their organization's purposes.

In short, the construction adopted below turns the entire statute into an absurdity. Plainly, membership "per se" means membership without other criminally significant acts or declarations, not membership without knowledge of the purposes of the group. No other interpretation accords with common sense and the plain purpose of the provision.[18]

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[17]The original Senate bill (S. 2311, 81st Cong., 1st Sess.) did not contain an immunity provision. The late John W. Davis raised the question of self-incrimination under Section 4(a) in a letter to the Senate Committee (Sen. Rep. No. 1365, 81st Cong., 2nd Sess., pp. 43-44). As a result of the Davis and other letters the Senate Committee added Section 4(f), providing that neither Communist membership nor office-holding should constitute a violation of Sections 4(a) or 4(c), the second of which proscribes the knowing receipt of classified information by Communist officers and members.

[18]*Cf. United States* v. *Ginn*, 222 F. 2d 289, at 290-91. It should also be noted that both Sections 4(a) and 4(c) make knowledge

Furthermore, the legislative history of Section 4(f)—ignored by the court below—shows that Congress specifically intended to protect Communist members and officers against prosecution under the membership clause of the Smith Act. As reported out by the Senate Committee, Section 4(f) related only to prosecutions under Sections 4(a) and 4(c) of the Internal Security Act. On the floor of the House of Representatives, this formulation was criticized by Representative Celler as inadequate, in that the protection was not extended to the membership clause of the Smith Act (96 Cong. Rec. 13739).[19] *Thereafter* the House adopted the amendment adding the words "or of any other criminal statute" (96 Cong. Rec. 13761), which was later included in the conference report and became part of the Act as passed into law. There is nothing but the membership clause to which the reference to "any other criminal statute" can apply.

Accordingly, the indictment does not charge the petitioner with any offense under the laws of the United States, and must be dismissed.

4. *The Evidence is Insufficient to Support the Conviction.* In the *Yates* case, this Court found (354 U. S. at 329) the evidence insufficient to establish that the Communist Party advocates forcible overthrow of the Government "in the sense of a call to action at some future time."

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an element of the crimes they proscribe, so that if Section 4(f) were construed to cover only membership without knowledge, it would be operative only with respect to persons who would not in any event be liable under Sections 4(a) and 4(c). This applies equally to the membership clause of the Smith Act, which punishes membership only if accompanied by knowledge, so that the phrase "of any other criminal statute" would likewise be robbed of all operative effect.

[19]The same point was made in the Senate Committee minority report (Sen. Rep. No. 2369, Part 2, 81st Cong. 2nd Sess., pp. 12-13) and in the debate on the Senate floor by Senators Kefauver and Humphrey (96 Cong. Rec. 14479, 15198).

The Communist Party therefore could not be treated as (*ibid.*) "the nexus between these petitioners and the conspiracy charged." However, inasmuch as the *Yates* defendants were charged with conspiracy to violate the advocacy and organizing paragraphs of the Smith Act—i.e. with individual activity in combination with others—the Court then scrutinized the record (354 U. S. at 331-32) to see whether there was evidence of criminal conduct.

But under the membership clause there is no charge of violating or conspiring to violate the other provisions of the Smith Act. Since the only charge is knowing membership in a group whereof the purposes are to advocate forcible overthrow, the group (here the Communist Party) is a necessary nexus between the defendant and the crime charged. Unless it be proved that the Communist Party is such a group, the conviction cannot be sustained. In other words, in a Communist Party membership clause case the prosecution must establish what, as this Court determined, it failed to establish in the *Yates* case.

At the close of the prosecution's case, the appellant moved (P. A. A18) for a judgment of acquittal, and in support thereof filed a memorandum (P. A. A25-A32) embodying an item-by-item comparison of the prosecution's evidence with the evidence in the *Yates* case found insufficient by this Court. As the memorandum shows, the evidence in the two cases is substantially identical. Every important strand of proof about the Communist Party that was presented at petitioner's second trial had also been presented in the *Yates* trial.

This similarity is hardly surprising, for both the documents and the witnesses, of which the record in this case is the product, are veterans of numerous prior Smith Act trials. The basic Communist "classical" writings by Marx, Lenin, Stalin, and others, after all, could hardly be improved

on by the Government's later efforts, however zealous.[20] Of the prosecution's principal witnesses on the aims of the Party, Lautner had testified in seventeen Smith Act trials including *Yates* (Tr. 450-51), and Mrs. Hartle had testified on the subject of Communism in nine prior cases (Tr. 893) and Cummings in six (Tr. 947-48). Without a remarkable refreshment of recollection, the prosecution witnesses' testimony about the Communist Party was bound to parallel, as it did, the earlier testimony on that subject in the *Yates* case.[21]

. . . .

The prosecution sought to escape this dilemma and give the record new color in two ways. The first was by offering the Korean and other comparable documents and testimony already discussed (*supra*, pp. 14-16). The second was to call a greater number of witnesses than was called in the first trial, in order to show a uniform pattern of indoctrination at the several Party schools attended by the witnesses. However, this extensive testimony added nothing beyond what was before this Court in the *Yates* case, in which there was abundant testimony that the Communist Party schools, as part of a nationwide campaign for re-education of Party members after 1945, and in order to stamp out Earl Browder's "revisionism," taught the inevitability of force and violence in the achievement of Socialism, the dictatorship of the proletariat, the class struggle, and other such elements of "Marxist-Leninist doctrine" (P. A. A29).

As this Court observed in the *Yates* case (354 U. S. at 329), such testimony "might have been well enough towards making out the Government's case if advocacy of the abstract doctrine of forcible overthrow satisfied the Smith

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[20]The prosecution's basic documentary proof about the purposes of the Communist Party was in fact substantially the same in both the *Yates* case and the present case (P. A. A31).

[21]The duplicating items and strands of proof are listed in the memorandum in support of the motion for acquittal (P. A. A26-A30).

Act," but it still left the record "strikingly deficient" in terms of action-inciting advocacy. And it would indeed be a strange outcome if the Communist Party should be found to be an action-inciting organization in Greensboro, on the basis of evidence substantially similar to that which this Court held insufficient in Los Angeles.

The Court of Appeals wholly failed to deal with this problem; there is not a word in its opinion about the evidence reviewed in the *Yates* case. There is no specification of evidence about the Communist Party, given at petitioner's second trial, which might be deemed to meet the crucial deficiencies noted by this Court in the *Yates* case.[22] The opinion below recites the evidence at length (Appendix A, *infra*, pp. 43-63), but the conclusory summation (*id.*, pp. 59-63) contains absolutely nothing that was not equally present and relied upon by the prosecution in the *Yates* case.

The lower court's treatment of the evidence received on the issues of petitioner's *knowledge* of the Party's aims, and his personal *intent* to overthrow the government by force, is equally unsatisfactory. Reliance is placed (Appendix A, *infra*, pp. 54-56) on statements made by the petitioner in 1949 and 1950— long prior to the limitations—about the impossibility of achieving Communism by educational means without accompanying violence. But these statements strikingly resemble those held insufficient by this Court, as "merely the expression of opinions about future events, rather than as advocacy of violent action for the overthrow of government,"[23] in *Nowak* v. *United States*,

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[22]In justice to the court below, it should be noted that the prosecution gave no help on this point. The Government's brief (p. 39, note 19) simply declined "to undertake the formidable task of comparing . . . the various 'strands of proof' in the two cases" and declared that no such analysis is "required in this case."

[23]The lack of "action-inciting" quality in petitioner's observations relied on below is underscored by his reply, when asked about the imminence of the revolution, that (Appendix A, *infra*, p. 56) "his fourteen month old daughter would marry a Communist in the United States."

356 U. S. 660, 665-68, and *Maisenberg* v. *United States*, 356 U. S. 670, 672-73; see also *United States* v. *Silverman*, 248 F. 2d 671, 678 (C. A. 2).

Otherwise, the court below relied principally (Appendix A, *infra*, pp. 61-62) on petitioner's general Party activities. Of course, under the *Yates* case this sort of evidence is quite insufficient as proof of petitioner's guilty knowledge or intent, and cannot sustain his conviction under the Smith Act.

5. *Petitioner Was Denied a Fair Trial.* Petitioner's indictment and trial were vitiated by numerous prejudicial errors; of which four are of such general importance as to warrant review and correction by this Court.

(A) There was highly prejudicial error in the admission of incompetent, irrelevant, remote and inflammatory evidence. The trial was conducted on the apparent assumption that anything ever said or written by any member of the Communist Party was admissible against the petitioner to prove the Party's unlawful aims.[24]

The three documents (G. Exs. 64, 65, and 66) relating to the Korean War were, beyond question, inflammatory and exceedingly prejudicial to the defendant (P. A. A18-A24). The prosecution did everything possible to exploit their emotional effect (P. A. A22-A24). The documents had no conceivable bearing on the issues in the case; nevertheless the trial judge permitted the prosecution to read to the jury such matter as the following (P. A. A21-A22):

> "As is often the case in Korea, the facts were worse than the rumor for at that time most Koreans were not acclimatized to the diabolical ruthlessness

[24]The defense objected to the admission of such evidence from the outset of the trial (Tr. 82-114, 115, 144, 159, and 161), but generally without success.

of the Americans and their puppets. Try to imagine Rangwul Valley. . . In the middle you can walk safely, though your shoes may roll on American cartridge cases, but at the side you must be careful for the rest of the valley is a thin crust of earth covering corpses of more than seven thousand men and women.

"One of the party with me stepped through nearly to his hip in rotting human tissue. Every few feet there is a fissure in the topsoil through which you can see into a gradual sinking mass of flesh and bone. The smell is something tangible that seeps into your throat. For days after I could taste the smell. All along the great death pit, waxy dead hands and feet, knees, elbows, twisted faces and heads burst open by bullets, stick through the soil.

"When I read of Nazi murder camps at Belsen and Buchenwald I tried to imagine what they were like. Now I know I failed . . .

"American officers, with officers of the puppet army, went in jeeps on each day and supervised the butchery. . . .

"This was only one of the massacres carried out at American instructions."

There was a vast amount of other irrelevant testimony, not so gruesome but equally prejudicial. For example, Government witnesses described Communist Party teachings concerning a so-called "Black Belt" of concentrated Negro population, throughout which the Negroes should be regarded as an oppressed "nation" with the right of self-determination. The prosecution made no effort to relate this testimony to the advocacy of force and violence, or to show that the "doctrine" of the "Black Belt" was ever put forward in an action-inciting way.[25]

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[25] *Cf.* the similar evidence presented in *Herndon v. Lowry,* 301 U. S. 242, at 250-53, wherein the defendant's conviction of attempted insurrection was reversed.

The trial court treated the issue of the Communist Party's aims as entirely distinct from the issue of the appellant's knowledge of those aims. On this theory, the court admitted unlimited prosecution testimony by former Communists, even though the events they described were utterly remote from the defendant. Thus the entire first half (seven days) of the trial passed before the defendant's name was even mentioned (Tr. 961). The 1945 national convention of the Communist Party in New York City, which is a crucial episode in the Government's case against the Communist Party, occurred while the defendant was serving in the armed forces of the United States at Bari, Italy (Tr. 1959).

How could a connection be shown between the teaching at a Party school attended by Lautner in New York in 1930 (Tr. 87-105) when the defendant, in Greensboro, was not yet of high school age? Why should Scales be bound by Mrs. Hartle's testimony about unemployed workers' demonstrations during that same year (Tr. 604-05), or her story of Communist control over the personal lives of a few individuals in Seattle (Tr. 723)? Yet these are but three examples of a staggering volume of testimony about persons and events far removed from the defendant, and generally irrelevant to the issues in the case.

To be sure, a federal judge has considerable discretion with respect to the order and scope of proof at a trial. But here the discretion was abused to a degree that hopelessly prejudiced the petitioner. It is too much to expect that a jury which has heard a full week of testimony about the Communist Party "subject to connection" will be able to lay it all to one side, and give weight only to such portions as are later made binding on the defendant. Nor, under such circumstances, can the jury be expected to winnow the few kernels of material evidence from the chaff of erroneously admitted and prejudicial testimony about "Black

Belts," the Stockholm peace appeal (Tr. 662-64), and American policy in China (Tr. 666-70).

(B) The trial court denied petitioner's request to examine the full texts of statements furnished to agents of the Government by prosecution witnesses. The conviction following his first trial had been reversed by this Court on the authority of *Jencks* v. *United States*, 353 U. S. 657. But several months after the *Jencks* decision, Congress enacted Public Law 85-269, now 18 U. S. C. 3500 (Appendix B, *infra*, pp. 88-89). Under the procedure prescribed in this statute, the materiality of the reports requested by the defense, if challenged by the prosecution, is determined by the trial court *in camera*. In the present case, the prosecution did challenge the materiality of certain portions of the reports requested by the defense; such portions were then submitted to the trial judge for his review as prescribed in 18 U. S. C. 3500, and many of them were withheld from the defense.

The defendant challenged (Tr. 678-80) the validity of the procedures set forth in the new statute, insofar as they operated to limit his access to the full texts of these documents. This very point was passed on by this Court in the *Jencks* case (353 U. S. at 668):

> "We now hold that . . . the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.
>
> "The practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with

> a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. See Gordon v. United States, 344 U. S. at 418."

It is clear from the foregoing passage that only a right of full access to witnesses' reports serves to protect the opportunity of the defense for full exercise of its right of cross-examination. Anything less is a denial of due process of law. "Justice requires no less."

Furthermore, the definition of "statement" in subsection (e) of Section 3500 is so arbitrary, capricious and unreasonable that it violates the due process clause. Statements by prosecution witnesses may be useful for impeachment whether or not the witnesses signed or subsequently "approved" them and whether or not they are "substantially verbatim" or "recorded simultaneously." Finally, the application of Section 3500 in the present case violated the Constitutional ban (Art. I, Sec. 9) on *ex post facto* legislation since its effect is substantially disadvantageous to the petitioner, whose alleged crime was committed before the enactment of this statute.

(C) The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal Security Act of 1950 (50 U. S. C. 781) deprived the petitioner of the opportunity for a fair and impartial trial. The findings in the latter statute have already (*supra*, p. 18) been described. The former finds that the Communist Party "is in fact an instrumentality of a conspiracy to overthrow the government of the United States" and is dedicated "to the proposition that the present constitutional government

of the United States ultimately must be brought to ruin by any available means, including resort to force and violence."

The indictment here charges that the Communist Party advocates the violent overthrow of the government. On this issue of fact, the defendant was entitled to a fair trial, before a jury able to reach an independent, objective and impartial verdict on the evidence. *Cf. Moore* v. *Dempsey*, 261 U. S. 86; *Frank* v. *Mangum*, 237 U. S. 309; *Manley* v. *Georgia*, 279 U. S. 1. But in the face of this Congressional finding, it was impossible for the jury to determine the question of violent overthrow on the basis of an independent, objective and impartial viewing of the evidence.

(D) The grand jury was illegally impanelled. Prior to the trial, petitioner filed a motion challenging the grand jury panel which returned the indictment.[25] The hearing showed that the method for securing names for the panel was that the clerks and jury commissioner requested various individuals[26] to provide the names of persons who were "suitable . . . for jury service" (Mot. Tr. 18-24). The only information received by the jury commission concerning these prospective jurors was their names and addresses. No questionnaires were ever sent to the members of the jury panel prior to placing their names in the box, nor were the individuals who were asked to supply names for jury service ever informed of the qualifications for jurors (Mot. Tr. 34-36).

This method of selecting jurors is an illegal delegation of the clerk's and jury commissioner's duties. *Glasser* v.

[25]Reference is made in this section 4(D) to the separately paginated transcript of the preliminary proceedings on motions in the District Court. These are designated "Mot. Tr.".

[26]Among those solicited were local sheriffs, superintendents of public schools, bank presidents and the Chairmen of the Republican and Democratic parties in the counties in the District.

United States, 315 U. S. 60; *United States* v. *Murphy,* 224 Fed. 554. It also results in a jury panel that is not a fair cross-section of the community. *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217. The applicable statute (28 U. S. C. 1864) provides that: "The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing." Here, there is no way of showing whether or not the names of three hundred qualified persons are in the jury box, since the jury commission knew only the names and addresses of the potential jurors. *United States* v. *Silverman,* 129 F. S. 496 (D. Conn). The method of impanelling the jury in this case prejudiced the defendant and worked harm to the jury system. *Ballard* v. *United States,* 329 U. S. 187, 195. This Court, in the exercise of its responsibility to supervise the administration of justice in the federal courts, should dismiss the indictment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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November 3, 1958.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7637.

JUNIUS IRVING SCALES,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

(Argued June 13, 1958. Decided October 6, 1958.)

Before SOPER and HAYNSWORTH, Circuit Judges, and BARKSDALE, District Judge.

Telford Taylor (McNeill Smith; Bynum M. Hunter; Richmond G. Bernhardt, Jr.: Taylor, Scoll & Simon, and Smith, Moore, Smith, Schell & Hunter on brief) for Appellant, and Victor C. Woerheide, Attorney, Department of Justice, (J. Walter Yeagley, Acting Assistant Attorney General; James E. Holshouser, United States Attorney; Harold D. Koffsky, Philip R. Monahan, Bruce

J. Terris and Jerome L. Avedon, Attorneys, Department of Justice, on brief) for Appellee.

SOPER, Circuit Judge:

This appeal is taken from a judgment of conviction under the membership clause of § 2(a)(3) of the Smith Act of June 28, 1940, 54 Stat. 670, 671, which has been codified in the U. S. Code of Crimes and Criminal Procedure in the third paragraph of 18 U. S. C. § 2385, as follows:

> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government[1] by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, * * *"

The indictment charges that during the entire period from January 1946 up to the date of the filing of the indictment on November 18, 1954, the Communist Party of the United States has been a society and group of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit; and that during the same period the defendant, Junius Irving Scales, in the Middle District of North Carolina and elsewhere, had been a mem-

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[1] i.e., the Government of the United States or the government of any State, Territory, District or Possession thereof.

ber of the Communist Party of the United States, well knowing that it was and is a society and group of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, the defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit.

The defendant was first tried and convicted under this indictment in April 1955, and was sentenced to imprisonment for six years; and the judgment was affirmed by this Court in 227 F.2d 581. The Supreme Court of the United States granted certiorari and after argument and confession of error by the United States, under the later decision in *Jencks* v. *United States*, 353 U.S. 657, the judgment was reversed, 355 U.S. 1. At the new trial in February 1958, the jury returned a verdict of guilty and the defendant was sentenced a second time to imprisonment for six years.

The defendant's first point is a repetition of the contention, rejected by this Court on the first appeal, 227 F.2d 586-588, that the membership clause of the Smith Act is invalid on its face under the First and Fifth Amendments since it abridges freedom of speech and imputes guilt merely from association unaccompanied by unlawful conduct. It is admitted that the Supreme Court has upheld the validity of state statutes[2] which punish persons who organize or become members of a society or group formed to advocate or teach criminal anarchy; and also that in *Dennis* v. *United States*, 341 U.S. 494, the Supreme Court upheld the constitution-

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[2]*Gitlow* v. *New York*, 268 U.S. 652; *Burns* v. *United States*, 274 U.S. 328; *Whitney* v. *California*, 274 U.S. 357; *Fiske* v. *Kansas*, 274 U.S. 380; cf. *De Jonge* v. *Oregon*, 299 U.S. 253.

ality of the advocacy and organization provisions of the Smith Act. But it is pointed out that in none of these cases were the defendants accused *only* of membership in the criminal organization, and that the statutes were held not to offend the First Amendment because they were designed to meet a clear and present danger to the state by prohibiting unlawful conduct in which the defendants had participated.

Specifically it is said that the *Dennis* decision was based on findings that the defendants were parties to an existing conspiracy which endangered the safety of the nation since it involved not merely the exposition of an idea but also the advocacy of unlawful action as well as personal intent on the part of the defendants to overthrow the government. Arguing that the membership clause of the Smith Act is constitutionally defective, the appellant seems to say that the clause does not require that the offender be engaged in any unlawful advocacy or party activity, either alone or in concert with other persons, but only that he be a member of the organization with knowledge of its purposes to overthrow the government by violence and hence "membership" as defined in the Act is merely the status and state of mind of a single individual and does not involve a clear and present danger to the state.

The argument is not persuasive since it fails to give proper weight either to the terms of the statute or to the *Dennis* decision in which §§(2)(a)(1) and (a)(3) and §(3), of the Act were specifically held to be constitutional, or to the decision in *United States* v. *Yates*, 354 U.S. 298, where the statute was interpreted and the *Dennis* decision was explained and approved. The terms of the membership clause are not satisfied merely by membership in a Communist group. The requirements are that the accused be a mem-

ber of a society or group who teach, advocate or encourage the overthrow of the Government of the United States by force or violence knowing the purposes of the society or group. In view of these provisions the Supreme Court in the *Dennis* case rejected the argument which is now presented to us in the following passage in its opinion, 341 U.S. 494, 502:

> "The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did 'no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas.' He further charged that it was not unlawful 'to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence.' Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged."

This view was developed and explained in *Yates* v. *United States*, 354 U.S. 298, where the Court said that it had long recognized the distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action, and that the legislative history of the Smith Act shows beyond all question that Congress was aware of this distinc-

tion and hence it could not be assumed that Congress chose to disregard a constitutional danger zone so clearly marked. The Court therefore found it unnecessary to decide the issue in terms of constitutional compulsion and held that it was the purpose of Congress to prohibit the advocacy and teaching of concrete action for the forcible overthrow of the Government and not of principles divorced from action. Showing that the decision in the *Dennis* case was in harmony with this interpretation, the Court said (pages 321 and 322):

> "* * * The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' *id.*, at 511-512, is not constitutionally protected when a group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. * * * As one of the concurring opinions in *Dennis* put it: 'Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken.' *Id,* at 545. There is nothing in *Dennis* which makes that historic distinction obsolete."

The appellant seeks to distinguish these decisions from the pending case because in them the defendants were charged with ***conspiracy*** to violate the teaching and organization clauses of the statute, whereas in the pending case the indictment charges the substantive offense of membership. The

distinction is without significance on the issue of constitutionality. The Scales indictment charges a guilty knowledge of the illegal purposes of the organization and the specific intent on the part of the defendant to bring them about as speedily as circumstances will permit. "No one could conceive," said Chief Justice Vinson in *Dennis* v. *United States*, 341 U.S. at 501, "that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence." The question in any case is "whether the means [adopted by Congress] conflict with the First and Fifth Amendments to the Constitution." In that case it was expressly decided that Congress had the power as a proper means to the end to prohibit a conspiracy to overthrow the Government; and, as Judge Parker pointed out in the first appeal in this case, 227 F.2d at 587, "the membership clause of the statute is of course nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence." It is too clear for argument that membership in an organization with knowledge of its purposes and an intent to make them effective is a joint rather than an individual undertaking which gathers its strength from an association or group of individuals inspired by a common purpose. The activities of such a group constitute a clear and present danger to the state and he who joins with open eyes becomes a party to all that he sees.

The appellant also renews the contention, rejected by this court on the first appeal, that the indictment under the membership clause states no punishable offense because of the provisions of §4(f) of the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 783(f). In §2 of this Act, 50 U.S.C. 781, Congress embodied the finding that the Communist movement in the United States is a rigidly and ruthlessly

disciplined organization which seeks the overthrow of the Government of the United States by force and violence, and hence presents a clear and present danger to the existence of the United States and of free American institutions which requires the enactment of legislation designed to prevent the accomplishment of this purpose. Accordingly, §4 (a) of the statute, 50 U.S.C. 783, makes it a crime for any person knowingly to combine or conspire with any other person to perform any act which would substantially contribute to the establishment of a totalitarian dictatorship in the United States under the domination of any foreign government, organization or individual; and §4(c) of the Act makes it unlawful for any agent of a foreign government or any officer or member of the Communist organization knowingly to obtain or receive from any officer of the United States any information which shall have been classified by the President as affecting the security of the United States. Sections 7 and 8 of the Act, 50 U.S.C. 786, 787, provide for compulsory registration of Communist organizations and the members thereof with the Attorney General under a criminal penalty for failure prescribed by §15 of the Act, 50 U.S.C. 794. The registration statements are required to contain the name and address of each individual who is an officer or member of the organization and in case the organization fails to register, it becomes the duty of any individual who is a member thereof to register with the Attorney General.

The legislative history of this statute shows that while it was under consideration Congress became aware that the registration provisions might be held unconstitutional as compelling self-incrimination under §4(a) of the Act making it a crime to conspire to establish a Communist organization in the United States and also as compelling self-

incrimination under the membership clause of the Smith Act.[3] On this account the bill was amended by the enactment of §4(f) of the statute, 50 U.S.C. 783(f), which provides that "neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute."

It is obvious that the provisions of the Internal Security Act which are aimed at membership in a Communist organization relate to the same subject as the membership clause of the Smith Act. Bearing this in mind, the defendant contends that the declaration in §4(f) of the Internal Security Act that membership in a Communist organization by any person shall not constitute per se a violation of subsection (a) of the statute, or a violation of any other criminal statute, effectively nullifies the membership clause of the Smith Act and bars a prosecution of the present case. It is said that the membership clause of the Smith Act must have been in the mind of Congress since there is no other criminal statute to which the last phrase of §4(f) could apply and, therefore, there is no ground for the prosecution of one whose only offense is membership in such an organization.

This contention was carefully considered in the opinion of Judge Parker on the first appeal in this case at 227 F.2d 589, where it was pointed out that the exemption from criminal prosecution under §4(f) is limited to membership per se and does not exempt from prosecution members of the Communist Party who hold membership in the organization with guilty knowledge of its criminal purpose to bring about

[3] S. Rep. No. 1385, 81st Cong. 2nd Sess., pp. 43-44; Cong. Rec. 13739, 13740; H. Rep. No. 3112, 81st Cong. 2nd Sess., 96 Cong. Rec. 15280.

the violent overthrow of the Government. This becomes the more clear in the pending appeal by reason of the contention of the defendant based on the holding of the Supreme Court in the *Dennis* and *Yates* cases that mere membership in a Communist organization unaccompanied by advocacy and teaching of concrete action for the forcible overthrow of the Government is not a punishable offense within the membership clause. With these considerations in mind the meaning of the provision of §4(f) that membership in a Communist organization shall not constitute per se a violation of the Internal Security Act or any other criminal statute becomes obvious. Indeed, it is now settled that a statute forbidding mere membership in a Communist organization would violate the First Amendment. Section 4(f) of the Internal Security Act does not bar the present prosecution.

It is hardly worthwhile to discuss the contention of the defendant that the jury was unable to reach an independent and impartial verdict on the evidence because of the finding of Congress in §2 of the Internal Security Act that the Communist Party was an organization which seeks to overthrow the Government of the United States by force and violence. Every criminal statute is an expression of opinion by Congress that certain conduct is meretricious and should be punished criminally. Such a statute is the Smith Act, and it would be difficult to find a juror who does not know that it was aimed primarily at the Communist organization. See *United States* v. *Lightfoot*, 228 F.2d 861, 870.

The defendant also contends that the membership clause, *as applied to the facts of this case*, is unconstitutional under the First, Fifth and Sixth Amendments. It is asserted that the evidence was not restricted, as it should have been, to the proof of concrete action by the Communist Party and the

defendant for the purpose of overthrowing the Government, but was allowed to range over a wide field so as to include activities in the form of free speech and free assembly protected by the First Amendment. It is also said that the defendant was not "informed of the nature and cause of the accusation" as required by the Sixth Amendment because the jury were instructed that the charge of membership in the indictment could be sustained only by proof that the defendant was an *active* member of the Party, so that a new element was introduced in the accusation which is not mentioned in the statute and is so vague that it presents no ascertainable standard of guilt; and hence the information clause of the Sixth Amendment and the due process clause of the Fifth Amendment were both violated.

We need not stop to give extended consideration to the last contention, for it is obvious that the defendant was not prejudiced by the instruction that in order to convict the jury must find that he was not only a member but an active member of the Party. This instruction was completely in harmony with the view expressed by the Supreme Court that the Smith Act contemplates not merely the advocacy of a theory of government but the advocacy of a concrete action of an unlawful character.

The other contentions obviously relate to the relevancy and sufficiency of the evidence to support the verdict and may be best considered after a statement of the evidence is set forth. It is well, however, to point out preliminarily that special duties with respect to the evidence are imposed upon the trial judge in a case of this kind. He must determine not only whether the evidence offered is relevant and is sufficient to prove the allegations of the indictment, as in the ordinary case, but he must also determine whether the facts proved

constitute such a clear and present danger to the state as to overcome the prohibitions of the constitutional amendments and justify a conviction under the statute. In other words, the judge must decide, as a question of law, whether it is proper from a constitutional standpoint to apply the statute to the situation disclosed by the testimony. This was the position taken by the trial judge in the *Dennis* case, and it was approved not only in the illuminating discussion by Judge Learned Hand at 183 F.2d 215, 216, but also in the opinion of Chief Justice Vinson in the following words (341 U.S. at 513, 514, 515):

> "When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case.
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> "The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to pre-

vent. Bearing, as it does, the marks of a 'question of law,' the issue is properly one for the judge to decide."

The Evidence

With these considerations in mind we now summarize the evidence that was adduced in the district court to support the allegations of the indictment: (1) that the Communist Party of the United States was at all times from 1946 until the finding of the indictment, a society which taught and advocated the overthrow of the United States by force and violence as speedily as circumstances would permit; and (2) that the defendant during this period was a member of the Party, well knowing its purposes and intending to effectuate them. The evidence relates to both categories and that which relates to the second not only shows the personal participation and activities of the defendant but supplements the general evidence as to the character and purposes of the Party.

Five ex-Communists gave testimony as to the character of the Party, two of whom, John Lautner and Barbara Hartle, were bona fide members and three, William Garfield Cummings, Obadiah Jones and Bellarmino J. Duran, became members in order to secure information for the Federal Bureau of Investigation.

Lautner was born in Hungary in 1902 but was brought to America at the age of sixteen months and lived in Youngstown, Ohio, until he was six, when he was taken back to Hungary. He there had a public school education and one and a half years at a teachers' college. He returned to Youngstown at the age of eighteen and became a naturalized citizen of the United States in 1926. He was a member

and a full-time employee of the Communist Party from 1929 to 1950, excepting the period of his military service between November 1942 and May 1945. In 1950 he was accused of being a Government agent and was expelled from the Party. At that time he was a leading member of the Party, having been chairman of the New York State Review Commission since 1947 and a member of the National Review Commission, the Party's top security board, since 1948. Since he had been a loyal member of the Party he was deeply disturbed by his expulsion and got in touch with the Federal Bureau of Investigation and volunteered to cooperate with the objectives of that organization in its investigation of the Party's activities. Since his expulsion he has testified as a Government witness in seventeen Smith Act cases and in numerous hearings before different Federal boards and departments and during this period he received $125 a week plus travel expenses.

When he joined the Party in 1939 he became a student with twenty others from different parts of the country at a national training school sponsored by the Party's Hungarian National Bureau and carried on in the City of New York. He attended another training school in 1941 with six other students, all of whom were high Party officials, and from 1931 to 1945 he was himself a teacher at various Party schools in Canada as well as in New York and Cleveland.

During the period from 1930 to 1931 he was taught, and in turn taught his own classes, that the ultimate aim of the Party was to bring about a fundamental change in the economic, social and political structure of capitalism in the United States and that this change could not be achieved peaceably but could and would come as a result of force and violence in wresting power from the capitalist class in this

country. Later, in 1947 and 1948, he taught Marxism-Leninism at the functionary school classes in New York, teaching substantially the same doctrine as that above described. The purpose of the course was to explain the application of the "classic" theories of Marx, Engels, Lenin and Stalin to the present day. These writings taught revolutionary principles of action, which included the acceptance of reforms obtained by legal means in order to use them as a screen for violent activities of a revolutionary character.

In July 1945, the National Convention held in New York reconstituted the Party. It was chiefly concerned with putting an end to the "revisionist" policies of Earl Browder, formerly General Secretary of the Party, which aimed at a peaceful rather than a revolutionary road to Communism in this country. In order to effectuate the change, the Party leaders conducted classes for students of various grades, which included the use of an outline of nine "lessons" each covering a specific phase of Marxism-Leninism with reference to the Communist classics. These outlines contained passages which specifically called for the use of force in overthrowing the governments of capitalist nations and taught that the liberation of the oppressed classes was impossible without violent revolution and destruction of the apparatus of state power.

When Lautner was appointed Chairman of the New York State Review Commission as a successor to J. Peters, he acquired a key job in Communist Party security. His duties included cleansing the Party of deviationist tendencies. No dissent and no deviation was allowed. At the National Convention in 1948 he acted as security chief, seeing to it that not only the press but other curious outsiders were excluded and that the whereabouts of every delegate was

known at all times. After the convention he was assigned the job of lining up a series of hiding places and communication points for the New York organization's underground system and finding trustworthy members in whose custody sums of money up to $20,000 could be deposited.

On cross-examination it was brought out that in 1930 Lautner married a young woman, at the direction of the Party, in order to enable her to become a naturalized citizen. She was a stranger to him at the time and he never saw her again after the ceremony. Subsequently, acting on the Party's instructions, he secured a divorce and remarried, but in 1941 he got an annulment based on the false statement that he was a practicing Catholic and the further statement that his second wife had falsely represented that she would embrace the Catholic faith.

Mrs. Hartle was born in 1908 in Evans, Washington. She was graduated from Washington State College and later engaged in various occupations including work on a magazine, department store advertising and the operation of a lending library and gift shop. She became interested in the writings of Karl Marx in 1931 and joined the Socialist Party in Spokane. There she came in contact with Communists who were recruiting Party members amongst the Socialists. She was persuaded by them to join a Communist-front organization called the Friends of the Soviet Union. By 1934 she held a Communist Party membership. She became secretary of a unit of ten members, was indoctrinated in the principles of Marxism-Leninism and was given various assignments in propaganda activities and the distribution of Communist educational material. She attended a Communist school in Seattle and in 1937 became the manager of a Communist book store which circulated Com-

munist literature including pamphlets and newspapers. She attended a "Stalin" school in Seattle at the expense of the Party and studied various Marxist and Stalinist texts. From then on she became more and more interested and more and more prominent in the Party and was given various positions of responsibility. She was a full-time Party worker from 1940 until 1952 and held numerous offices, including membership on both the District Board and the District Committee of the Northwest District, an area which included Washington, Oregon and Idaho. In 1945 she succeeded to the number two job in the District, that of Organizational Secretary.

Mrs. Hartle played an important part in the activities of the Party in 1945, when a marked stiffening of Party doctrine took place. She was a delegate from the Northwest District to the emergency National Convention held in New York City in July of that year. Immediately prior to the convention a letter written by Jacques Duclos, the French Communist chief, was published in this country first in the *New York World-Telegram* and later in various Party publications. It became the subject of anxious discussion in Party circles and the principles which it espoused were adopted. The substance of the letter was that, under the leadership of Earl Browder, the Communist Party of the United States had revised and departed from the doctrines of Marxism and Leninism and had given up the class struggle and the dictatorship of the proletariat as necessary to the achievement of the aims of Communism. A resolution to this effect was offered by the Resolutions Committee, of which Mrs. Hartle was a member, and was passed by the Convention. It was concluded that the Party should not pursue the peaceful road to Marxist socialism but the revolu-

tionary road to upset the capitalist system in the interest of the working class.

In April 1946, Mrs. Hartle was assigned by the Northwest District to attend the National Training School at a summer resort near New York City. She attended its sessions for a period of two months with thirty other students all of whom were officers and functionaries of the Party. The school was under the direction of one Jacob Mindel. It was part of a re-education program the purpose of which was to train theoreticians and propagandists and to dispose of and to destroy the last remnant of "revisionism" of the Browder era. Emphasis was placed on the struggle between the capitalist and working class and the duty of the Communist Party to foment the class struggle by revolutionary tactics. The general aim was said to be a proletarian revolution to accomplish the dictatorship of the proletariat. The students were taught that a spontaneous struggle of the working class would never succeed and that in order for Marxist socialism to succeed a seizure and retention of power through a dictatorship was essential. It was taught that the United States was the foremost imperialist country in the world and was at the stage for proletarian revolution. The students were told that the members of the Communist Party must go amongst the workers and the masses and gain leadership of them by participating in their struggle. During these studies the classic texts of Marx, Engels, Lenin and other leaders were used. The students were told that the United States was a "bourgeois state" and "must be forcibly overthrown by the working class led by the Communist Party," and that the Communist Party must prepare the working classes for this seizure of power. Two examples of the revolutionary seizure of the state by force and violence were given; i.e., the Paris Commune, which was described

s the first attempt c e proletariat to storm the citadel of
pitalism, which failed because the proletariat did not take
fficient steps to retain the power, and the 1917 Bolshevik
evolution in Russia. Mindel explained that imperialist
ars could "only be ended by the civil war of the workers
gainst their own government," with the Communist Party
the lead.

Mrs. Hartle herself used the instructions she received at
is school when she later taught in the Party's training
hools in the Northwest District between the years 1946
1950. In summarizing what she taught between 1945 and
50, before she went underground, she said that the Party
al was the dictatorship of the proletariat which could only
obtained by forcible means and that force and violence
uld be used to seize control when the conditions were ripe
this event.

In 1950, Mrs. Hartle disappeared into the Party's under-
ound apparatus at the direction of her superiors. For a
le over two years she lived under an assumed name and
ved frequently from one place to another in Washington
l Oregon. The purpose of the underground was to con-
l the identity of Party members in positions of impor-
ce so that in case leaders of the Party were arrested for
lating the Smith Act or for other reasons the Party would
lack trained personnel ready and able to carry on. Mrs.
rtle welcomed the change from the strenuous work she
previously performed but began to question the impor-
ce of the work and to lose interest in effectuating the
ty purposes. This marked the beginning of her break
h the Party, but before this actually took place she was
ested by the FBI in September 1952, and in 1953 was
cted, tried and convicted for violating the Smith Act.

She was sentenced to five years imprisonment and ordered to pay a fine of $1000. She was released on bail pending appeal. During the trial she was notified by the Party that she was to be expelled for failing to follow Party discipline and for refusing to attend certain underground meetings. She agreed, however, to stand by the Party during the trial, and did so. On April 12, 1954, however, she made contact with the FBI and subsequently withdrew her appeal and was imprisoned for twenty and a half months until she was paroled on February 1, 1956. During her incarceration and subsequently, she testified before Congressional committees and for the Government in certain investigations into Communist activities and in criminal prosecutions brought under the Smith Act.

In line with this testimony was the evidence of William Garfield Cummings of Toledo, Ohio, who joined the Party at the request of the FBI in February 1944. He testified that in December 1945 he attended the Party's Mid-West Regional School at Chicago and was taught by George Siskind, the principal instructor, that the capitalist system must be overthrown and that this could be done only by force and violence. He was also taught that the United States was in the last "imperialistic" stage of capitalism and that the only solution for the working class was the overthrow of the Government by force and violence, just as was done in the Bolshevik Revolution in Russia.

Obadiah Jones of St. Louis, Missouri, a Baptist minister and elevator operator, gave evidence as to the operation of a Communist Party training school which he attended in that city in 1947. The school was conducted under the guidance of George Siskind, the principal teacher, and Ralph Shaw, the chairman of the Party in Missouri. The students

were furnished with books containing the teachings of Marx, Lenin and Stalin and were taught that the only way that the Negro problem of the "Negro nation" in the Black Belt of this country could be solved was by a proletarian revolution led by the Communist Party whereby capitalism would be wiped out by violence and bloodshed. The students pledged themselves to work for the Party and to carry out the instructions of its leaders even though it meant to fight and to kill. Jones made reports of his connection with the school and the Party to the FBI and testified for the United States in Communist investigations and prosecutions.

Bellarmino Duran, a resident of Denver, Colorado, who was brought up in a household where Spanish was spoken, was educated in grade schools in Wyoming, Idaho and Colorado. In March 1951, he attended a special school in Los Angeles, California, which was established by the National Education Committee of the Communist Party of the United States and was known as the National School for Mexican Cadres. At that time he was a member of the Communist Party of the State of Colorado and was furnishing information to the FBI. The persons in charge of the school were Art Berry, District Organizer of the Party for the districts of Montana, Idaho, Colorado, Utah, New Mexico, Arizona and Texas; and Alberto Moreau from the Jefferson School in New York City. All of the students in the school spoke Spanish. At the beginning teaching was in his language and later English was used. Berry explained to the students that the school was established to enable Mexican cadres to study the theories of Marx and Lenin in relation to the liberation of the Negro, Puerto Rican and Mexican people of southwest United States. Moreau spoke in an introductory talk about the monopoly of capitalism

which had progressed into imperialism and the necessity of teaching the masses that the system must be changed and that this could only be done through a proletarian revolution in which the workers in industry and agriculture would participate and in which the speaker visualized himself as carrying a gun against the capitalists. The students were taught that the proletarian revolution could not be brought about in a peaceful way but could only be accomplished by force and violence through which the state machinery of the bourgeoise, including the courts and the military establishments, would be smashed. He explained that the Communist Party would be the vanguard of the movement and after it was successful and the Party was in control the guns would be collected from the people so that they in turn might be controlled.

Duran was a member of the Party from 1948 until April 1955, when he was expelled upon the charge that he had taught force and violence in violation of the Constitution of the Communist Party. At that time he was asked to sign a note containing the false statement that the Communists did not teach the violent overthrow of the Government, but he refused to do so.

During his connection with the Communist Party he received compensation from the FBI for his services and subsequently testified in criminal prosecutions under the Smith Act and in other investigations on behalf of the Government.

Evidence As To Scales

Ralph C. Clontz, Jr. testified at length in regard to the activities of the defendant Scales, of which he had first-hand knowledge from personal association. He also testified

as to the activities and teachings of the Communist Party in general. He was the son of a Presbyterian minister and a resident of Charlotte, North Carolina. He was educated in the local schools and graduated from Davidson College in 1947, and from the Duke University Law School in 1950. After having completed three and a half years at Davidson, he enlisted in the army in 1942. When he was discharged in 1946 he held the rank of lieutenant and worked for military intelligence in Salzburg, Austria. In 1948, having become aware of Communist activity in North and South Carolina and fearing imminent war with Russia, he offered his services to military intelligence. They sent him to the FBI and he arranged with that organization to attempt to penetrate the Communist Party and find out what was going on. The FBI accepted his proposition but warned him that he would serve without compensation, and that if he got into trouble the Government would not recognize him and come to his aid.[4]

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[4]Clontz was not paid anything by the FBI for his activities during the year 1948 but paid all of his expenses, including travel, out of his own pocket. He was at that time enrolled at the Duke University Law School, but held full-time employment as the Division Sales Manager for Carolina Motor Club with upwards of twenty field representatives, i.e., salesmen, working under him. In 1949, his activity in the Party and at the law school made it necessary to cut down his salesmen to three. Around July 1949 he began to receive reimbursement from the Government for out-of-pocket expenses such as gasoline and the cost of Communist literature and other expenses necessary to carry on his investigation. In 1948 he had received $24.95 for services and expenses. At the end of 1949 he started receiving $20.00 a month from the Government. He was then married and had one child. The first of 1950 this monthly compensation was increased to $40.00 in addition to expenses; and when the Party sent him to the Jefferson School in New York in the summer of 1950 the Government paid him the equivalent of a first lieutenant's pay for the three-weeks period. When he returned to North Carolina his monthly payment was increased to $60.00 and remained at that until he went on full-time duty as a Government agent in January 1951. Thereafter he received a net sum of $450.00 a month plus expenses. He had, in

Thereupon, on September 9, 1948, he wrote to the defendant Scales telling him that he was a law student and was interested in Communism. Very shortly thereafter Scales sent him a large box filled with Communist literature and a letter inviting him to call at Scales' residence in Carrboro, North Carolina. Clontz called and had dinner with Scales and his wife. After dinner a discussion about Communism took place in which one McGirt, another Communist who came in later, participated. Scales explained that he had received a lot of Communist literature from the Party headquarters in New York. A later visit took place shortly before Christmas and at this time Clontz expressed the view that he had learned from his reading that Communism was a wonderful system and if the Party would educate people, they would vote the Communist Party into control of the Government. In a vigorous and extended reply, Scales said that this was completely impossible since the Government controlled all of the media of communication and education, as well as the Army, and that Communist success could only be accomplished by a militant force like that which had brought about the Bolshevik Revolution in Russia. Scales furnished Clontz with the works of Stalin, in which it was said that the Bolshevik Revolution could serve as a model of tactics in any country and that the oppressed classes could not be liberated without a violent revo-

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the meantime, opened a law office, but he took a "cover job" in New York as a fraudulent claims inspector with the Association of Casualty and Surety Companies while he was acting as special agent for the Government. He received $300.00 a month from the Association but turned this over to the Government. He worked for the Association during the day and as a special agent for the Government at night at least four nights a week. Other than his wife, no one knew of his Government connection. The salary of $450.00 lasted until February 3, 1953, when he quit Government service and commenced the full-time private practice of law. His association with the Government cost him money—his expenses in New York were $100.00 a month more than he received from the Government with the result that his savings of $2500 were wiped out.

lution and the destruction of the state. The revolutionary strategy was based on the idea that the revolution could be accomplished by bringing two classes together in common cause: first, the working class or proletariat and second, the "Negro nation" located in the thirteen Southern States. This was the repeated statement of Scales on various occasions in 1949 and 1950. At one time he said that the situation in the United States was closely analogous to the situation in Russia at the time of the Bolshevik Revolution when the Communists were in the minority in the month of July but were nevertheless victorious in seizing control of the government in the following October. Scales did not expect a revolution in the United States very soon but thought that if a depression came there would be a bloody revolution.

In December 1949, Scales suggested that Clontz become a member of the Party and Clontz agreed that Scales submit his application to the Party leaders. Around about this time Clontz was given several pieces of literature, including an outline entitled "Thirty Years of the Communist Party U.S.A.," a copy of the Constitution of the Party, a Study Course of the Communist Party, the Working Class and Industrial Concentration. The first part of 1950 Scales informed Clontz that certain Communists at the university at Chapel Hill had formed a Karl Marx Study Club and later certain representatives of the Party from New York gave lectures to the club at the university. At these lectures it was stated that the Communists believed that a revolution of the kind that had taken place in the Soviet Union was a certainty and a necessity and that things were moving fast and the revolution would certainly come before long.

Clontz became a member-at-large of the Communist Party on or about January 17, 1950. He was not given any

card but was given a receipt for $1.50 for initiation and the first month's dues. Thereafter Scales gave Clontz private tutoring to prepare him for work in the Party. When asked when the revolution would come, Scales expressed the view that it would not come very soon but would come in time and that his fourteen month old daughter would marry a Communist in the United States. He felt that if a depression was imminent, it would greatly accelerate the coming of the revolution. During this period Clontz met Bernard Friedland, District Organizer for the Communist Party in the Carolinas, who questioned him about his background and his beliefs. Scales furnished Clontz with a number of Communist books for study in March 1950, including the "Foundations of Leninism," the "Problems of Leninism" by Stalin, and other works. In these works were a number of passages in which it was clearly stated that it was absurd to think that the revolution could be carried out peaceably without violence. It was said that the Soviet Union would not send troops to America to help in the revolution but would furnish experienced revolutionaries as instructors and supervisors.

In June 1950, Clontz told Scales that he would like to attend the summer session of the Communist school in New York called "The Jefferson School of Social Science." Accordingly, Scales arranged for Clontz's admission and saw to it that he was provided with a scholarship to cover his expenses. In August 1950, during the three-week course, Clontz received special instructions from one Doxey Wilkerson, an instructor of the school and a member of the Party's National Committee. Wilkerson instructed Clontz that while some Party members had hoped that the Communists could gain power by peaceful means, it was necessary to "forget all this drivel," and that there was no longer any pretense

that the Communists could win by the people's vote and that a violent revolution was necessary, which would come about by combining the forces of the "Negro nation" and the working class within the Communist Party. Clontz was also instructed that the Party in the South had been partly underground for a long time and that plans were being made for operation on an individual basis in secret communications from New York to the rest of the country. Clontz was instructed to remain under cover when he returned to North Carolina and maintain contact with an undercover Communist club. As part of the concealment process, an official statement had been issued by the Education Commission of the Party disowning or disclaiming certain study outlines, texts and publications. This was done to establish a technicality for Communists on trial and their attorneys to make conviction more difficult. It would not, however, hamper the Party because the instructors could fill in orally the revolutionary part.

During the period in which Clontz was being instructed in the doctrines of the Communist Party the defendant Scales was engaged in similar activity with Government witnesses Otis R. Readis and Charles Benson Childs. Readis was a native of North Carolina employed by the Western Electric Company at Winston-Salem. Childs was a resident of High Point, North Carolina, a student at High Point College (1948-1950), an employee of the Western Electric Company at Winston-Salem (1951), and later a student at the University of North Carolina. Scales arranged for each of these men to attend Communist schools. He sent Readis to the Jefferson School in New York and Childs to a Party school for outstanding Party members from the Virginia and Carolina District which was held on a farm near Winston-Salem. Scales himself was the director of this school.

In both of these schools the students were instructed in the principles of the Communist Party.

It was brought out in the testimony of these North Carolina witnesses that Scales occupied an important position in the Party as the chairman of the North and South Carolina District and as such reported regularly to the National Committee on the activities of the Party in his district, and saw to it that the directives of the National Committee were carried out in that area. These included the recruiting of members into the Party and the selection of promising Party members for further education in Communist doctrines. In December 1951, according to the testimony, he disappeared into the Communist underground. The evidence showed that he was completely familiar with the "Marx-Lenin classic" and that as a leader of the Communist Party he believed in and advocated the violent overthrow of the Government at the earliest feasible opportunity.

The evidence offered on behalf of the appellant Scales is stated as follows in the brief filed on his behalf in this court:

> "The appellant did not testify. For the defense, ten witnesses were called, nine of whom knew Scales during the period that he was a member of the Communist Party, and testified in support of his character and conduct. These included two clergymen, a radio station employee, a professor at the University of North Carolina, a Greensboro businessman, a textile mill worker, the wife of a Superior Court judge, and the appellant's mother and aunt. None of them had heard the appellant advocate force and violence, and several of them testified to Scales' statements and attitudes, heard by and known to them, which were inconsistent or incompatible with any such advocacy."

From the testimony of members of his family it was learned that Scales was born in Greensboro, North Carolina, in 1920. After finishing his secondary education in local schools he was an undergraduate student at the University of North Carolina and held various jobs in Greensboro and High Point, North Carolina. In June 1941 he was married and in December of that year, shortly after the Japanese attacked Pearl Harbor, he enlisted in the Army Air Force. He attended the Officers Candidate School but was dropped before securing a commission. He went overseas in 1945 and was discharged in February 1946. He returned to the University of North Carolina and was graduated in February 1946, after which he undertook certain graduate work in history. In the autumn of that year he made a public announcement of his membership in the Communist Party.

Taking this evidence in the light most favorable to the prosecution, which must be done if the historic function of the jury is to be recognized, it is fair to say that, contrary to the appellant's contentions, the allegations of the indictment have been sustained. There is indeed no substantial conflict in the evidence since the only testimony of the defendant's bearing on the merits of the case, i.e., the testimony of certain of his neighbors that they never heard him advocate force and violence, does not preclude the finding that he really believed in the tenets of Communism and advocated them in dealing with actual or prospective Party members. Nor does this evidence on his behalf contradict in any way the description of the Communist Party and its activities given by the witnesses for the United States.

It was clearly shown that the Communist Party "is of sufficient size and cohesiveness, is sufficiently oriented to-

wards action, and other circumstances are such as reasonably to justify apprehension that action will occur." (354 U.S. at 321). It is organized and staffed on a national scale with territorial divisions presided over and directed by district leaders. It is constantly engaged in the infiltration of the working classes and in recruiting members in various parts of the country. It holds annual conventions, attended by representative leaders from the various districts and policed for security reasons to limit the attendance to loyal members, which determines the policies to be pursued and the methods to be employed by Party members. It maintains an underground apparatus in which important Party members in danger of arrest or interference disappear under assumed names in order that the Party may not lack leadership in times of emergency. It masks its purposes by false statements when it deems it expedient to do so.

It maintains training schools for officials and for novitiates in various parts of the country, in this case there is specific reference in the testimony to schools in New York, Canada, Seattle, Chicago, St. Louis and Los Angeles; and it distributes literature to members and prospective members. The true character and aim of the organization is shown by the teaching provided at these schools, as to which there is abundant uncontradicted testimony. At all of them, without exception, the students are taught that the United States is in the grip of a capitalistic society which oppresses and exploits the workers, and that this grip cannot be broken by peaceful and democratic means but only by the destruction of the institutions of the state by force and violence in a revolution of the workers led by the Communist Party in the vanguard. This doctrine is not held up to the students as a bare theory but as a basis for concrete action which must and will be taken whenever in the future a favorable

opportunity presents itself. This doctrine was reaffirmed by the action taken by the Party at its National Convention in 1945 when the peaceful policies advocated by Earl Browder were condemned and repudiated and the recommendations of Duclos, the leader of French Communism, were endorsed. On these facts the jury was entirely justified in reaching the conclusion that the elaborate structure of the Communist Party was set up for unlawful revolutionary concrete action accompanied by force and violence rather than for the mere advocacy of a theory of government.

The evidence in regard to Scales himself not only reinforces the conclusion as to the character of the Communist Party but justifies his conviction of charges contained in the indictment. We do not know what influences led him to become a member of the Party, for neither the United States nor the defendant offered any evidence on this point, but we do know that he was a prominent and active member of the organization, who served as chairman of the Carolina District of the Party and was active in recruiting suitable Party members amongst the university students in North Carolina, and that he furnished them with Communist literature and advised and instructed as to the Party doctrines and arranged for their attendance at established Communist schools where formal classes of instruction were given. He himself was a director of one of these schools and in harmoney with their course of instruction, as above described. He himself in his contacts with new members consistently and repeatedly preached the revolutionary doctrine that, in the interest of the proletariat, the institutions of the state must be destroyed by force and violence as soon as it was reasonably possible to do so. He was constantly in touch with the national leaders of the organization and obeyed

their instruction that he should go underground under an assumed name.

We reach the conclusion of law, as did the trial judge, that the evidence in regard to the activities of the Communist Party and of Scales constituted proof of advocacy of concrete action, as distinguished from the promulgation of a theory, which created a clear and present danger of substantive evil beyond the protections of the First Amendment and within the right and power of Congress to prohibit. In our opinion, this conclusion is in accord with the approval given in *Yates* v. *United States*, 354 U.S. at 321, 323-324, to the essence of the *Dennis* holding in these words:

> "* * * Although the jury's verdict, interpreted in light of the trial court's instructions, did not justify the conclusion that the defendants' advocacy was directed at, or created any danger of, immediate overthrow, it did establish that the advocacy was aimed at building up a seditious group and maintaining it in readiness for action at a propitious time. In such circumstances, said Chief Justice Vinson, the Government need not hold its hand 'until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.' 341 U.S., at 509."
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> "* * * Bearing in mind that *Dennis*, like all other Smith Act conspiracy cases thus far, including this one,

involved advocacy which had already taken place, and not advocacy still to occur, it is clear that in context the phrase just quoted referred to more than the basic agreement to advocate. 'The mere fact that [during the indictment period] petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was *ready to make the attempt*. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come *for action*, coupled with . . . world conditions, . . . disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. . . . If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.' 341 U.S., at 510-511 (emphasis supplied)."

We find nothing at variance with these conclusions in the recent decisions of the Supreme Court in *Nowak* v. *United States*, 356 U.S.—and *Maisenberg* v. *United States*, 356 U.S. —. See *United States* v. *Silverman*, 2 Cir., 248 F.2d 671.

Admissibility of Evidence

It is contended that the judge erred in the admission of irrelevant evidence of an inflammatory character describing the activities of the Communist Party so that the defendant as a member of the Party was prejudiced in the eyes of the

jury. Three documents relating to the Korean War are singled out, which were published by the Communist Party or under its auspices. They were a publication entitled "Pre-Convention Discussion Bulletin" issued by the Communist Party of the United States; a copy of the Moscow newspaper "Trud"; and a pamphlet entitled "I Saw the Truth in Korea" by Allen Winnington, a correspondent of the *Daily Worker* in Peking. They were given to Clontz by Scales in 1950 and 1951, the first two in Washington, D. C. and the third in Durham, North Carolina. They accused the United States of launching and waging a criminal, reactionary, imperialistic war in Korea to enslave the North Korean people and deprive them of their independence. The last mentioned document described a small area in the Rangwuel Valley near Taejon, where it was said that the bodies of 7000 political prisoners were found in shallow graves who had been massacred under American supervision and in accordance with American instructions.

Motion for mistrial on the ground that the publications were calculated to inflame the passions of the jury was denied. The judge, however, cautioned the jury that they should weigh the evidence objectively and should not allow themselves to be excited or inflamed so as to impair their ability to try the case impartially as between the Government and the defendant.

In addition, the defendant complains of the admission in evidence of Communist activities relating to the existence of a Black Belt in southern United States where the Negro population was oppressed and denied the right of self-determination; and the general contention is also made that the judge should not have admitted evidence of Communist

doctrines and aims entirely distinct from Scales' knowledge of them.

In our opinion the evidence was properly received. That part to which the attack is chiefly directed consisted of documents handed by Scales to Clontz which were clearly intended to blacken the United States and stir up animosity against it and thus weaken its ability to defend itself should a revolution be attempted. It clearly served to corroborate the testimony in regard to Scales' activities in securing Party members and promoting the general objectives of the Party.

That part of the evidence which pertained to the activities of the Party with which he had no immediate connection was relevant, since it tended to prove the allegations of the indictment that the Communist Party of the United States was a group of persons who taught and advocated the overthrow of the Government of the United States by force and violence. That Scales had knowledge of these objectives is shown by direct testimony as to his own teachings and activities on the Party's behalf. In respect to this contention, we said in denying the former appeal, 227 F.2d at 589:

> "* * * We think that this complaint is entirely without merit. The evidence as to the teachings carried on by the party and the documents used in the teachings was clearly competent to show the aims and purposes of the party; that which related to infiltration, subversion and the arousing of dissension had a direct bearing on the purpose to overthrow the government by force and violence when a favorable opportunity should present itself; * * *"

CHARGE OF THE COURT

The case was fairly submitted to the jury by the judge's charge. The jury were told that in order to convict the defendant they must find that the Communist Party teaches or advocates the overthrow of the Government of the United States by force and violence as speedily as circumstances will permit; that the defendant was a member of this Party who well knew of its teachings and purposes and that the defendant himself specifically intended to bring about such overthrow.

The jury were warned, however, that it is not criminal to hold or express the belief that the Government of the United States should be completely changed or to have such a change of government as a purpose or aim, or to express the opinion that the Government will at some time be overthrown by force and violence and that it is not criminal to criticize the Government and its policies, whether you agree or not with the truth or falsity of the criticism.

The jury were further told that it could not convict the defendant merely because he was a member of the Party no matter what its purposes and teachings are; and that teaching in the abstract what is meant by the aim to overthrow the Government by force and violence is not criminal, and that without being criminal the Communist Party could try to persuade its members to espouse the belief that the Government should be overthrown by force and violence as speedily as circumstances permit, since this is no more than advocating an idea; but that if the Party went further and with the intent to overthrow the Government by force and violence advocated a principle of action which called on its members to take forcible and concrete action at some

propitious time to overthrow the Government by force and violence, and pressed that call in such a way as to incite its members to take concrete and forcible action for such overthrow, such activities were forbidden by the Smith Act; but those to whom the advocacy is addressed must be urged to do something now or in the future rather than merely to believe in something.

Summarizing this portion of the charge the Court said:

> "It is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by the Smith Act, but rather the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find that the Communist Party of the United States was a society or group of persons who teach or advocate the overthrow or destruction of the Government of the United States by force and violence, unless you are satisfied beyond a reasonable doubt that the Party did in fact so teach and advocate, and did so with the intent that such teaching or advocacy be of a rule or principle of action, and by language reasonably and ordinarily calculated to incite persons to such action, all with intent to cause the overthrow or destruction of the Government of the United States by force or violence as speedily as circumstances would permit."

Finally, the jury were told that although the defendant admitted that he was a member of the Party it was not sufficient that he be simply a member. It must be more than a nominal, passive, inactive or purely technical membership,

and that in determining whether he was an active or inactive member the jury must consider how much of his time and effort he devoted to the Party; "to be active he must have devoted all or a substantial part of his time and efforts to the Party;" and that a specific intent on the part of the accused to bring about the overthrow of the Government as speedily as circumstances would permit was a necessary and indispensable requisite of the offense.

THE JENCKS STATUTE

The defendant also contends that he was denied a fair trial because he was not permitted to inspect the entire reports and statements made to the Federal Bureau of Investigation before the trial by Government witnesses with respect to the subject matter of their subsequent testimony. During the trial the defendant called for the production of these reports and statements so that he might inspect them. They were accordingly produced but they were first delivered to the District Judge *in camera*, who excised therefrom such portions as do not relate to the subject matter of the testimony, and then turned them over to the defendant's attorney for his use. The defendant contends that this procedure did not conform with that laid down by the Supreme Court in *Jencks* v. *United States*, 353 U.S. 657. That case involved the conviction of the president of a labor union for false swearing in an affidavit, filed pursuant to §9(h) of the National Labor Relations Act, that he was not a member of the Communist Party. The principal witnesses for the Government were two Party members in the pay of the FBI, who testified concerning the Party activities of the defendant. On cross-examination they testified that during the course of their investigation they made reports to the FBI concerning the defendant's activities. Thereupon

the defendant's attorney moved the Court to produce these reports for inspection and use in cross-examination. The judge denied the motion and his action was affirmed on appeal (226 F.2d 540, 553) on the ground that no preliminary foundation was laid showing inconsistency between the contents of the reports and the testimony of the witnesses.

The Supreme Court reversed, holding that the defendant was not required to lay such a foundation because a sufficient foundation was established by the testimony of the witnesses that their reports related to the events and activities covered by their testimony. The Court said that to require the accused first to show conflict between the reports and the testimony would be to deny the accused evidence relative and material to his defense, since in the absence of an admission of conflict he would be helpless to know or discover conflict without inspecting the reports; and hence a requirement of showing conflict would be incompatible with our standards for the administration of criminal justice in the United States. The Court further held that relevancy and materiality for the purposes of production and inspection with a view to use on cross-examination are established when the reports are shown to relate to the testimony of the witness. The Court condemned the practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused and held that the defense must be entitled initially to see the reports to determine what use may be made of them; only thereafter may the trial judge determine the admissibility of the reports and the method to be employed for the elimination of immaterial or irrelevant parts. Conceding that the protection of vital national interests may militate against public disclosure of documents in the Government's possession, the Court held that in a criminal action the

choice lies with the Government and if it elects not to comply with an order to produce relevant statements of reports of witnesses in its possession touching the subject matter of their testimony, the criminal action must be dismissed.[5]

The procedure prescribed in the *Jencks* case had not been generally recognized or followed in the Federal courts, nor had the practice been uniform. One accepted procedure required a showing of inconsistency between the pre-trial reports and the testimony of the witness as a basis for the production of the report. The Fifth Circuit, in its decision in the *Jencks* case, 226 F.2d 540, 552, and its earlier decision in *Shelton* v. *United States,* 205 F.2d 814, 815, found encouragement for this course in the decision of the Supreme Court in *Gordon* v. *United States,* 344 U.S. 414, 418-419, as did the First Circuit in its decision in *Scanlon* v. *United States,* 223 F.2d 382, 385-386. A different procedure was approved in the Second Circuit in the opinion of Judge

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[5]The Court said, 353 U.S. 668:

"* * * We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

"The practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant. See Gordon v. United States, 344 U.S. at 418."

Learned Hand in *United States* v. *Krulewitch*, 145 F.2d 76, 78-79. This practice did not compel the defense to lay a preliminary foundation of inconsistency but required the delivery of the reports to the judge, if requested by the defendant, as soon as it appeared that they had been made by the witness and related to the subject matter of his testimony. It then became the duty of the judge to examine the statements *in camera* and if he should find something in them contradictory to the testimony of the witness, they were then delivered to the defendant for such use as he might desire.[6] It will be observed that in both of these procedures a showing of inconsistency had to be made, but the latter practice was the more helpful to the defendant since it relieved him of the difficulty of showing inconsistency in the reports before they were produced for examination.

The *Jencks* decision gave rise to much discussion in legal circles[7] and very quickly led to the passage of the Act of Congress of September 2, 1957, 71 Stat. 595, whereby Chapter 223 of 18 U.S.C., entitled "Witnesses and Evidence," was amended by adding a new section 3500. The purpose of this statute, as shown by the Legislative History set out in 2 U.S. Code, Congressional and Administrative News, 85th Congress, First Session, 1957, page 1861 et seq., was to provide an exclusive procedure for handling demands for the production of statements and reports of witnesses in court so as to preserve the rights of defendants and at the same time to protect confidential information in the possession of the Government. An additional purpose was to correct what seemed to Congress to be a widespread misinterpretation

[6] See also *United States* v. *Cohn*, 2 Cir., 145 F.2d 82, 92; *United States* v. *Ebeling*, 2 Cir., 146 F.2d 254, 256; *United States* v. *Lebron*, 222 F.2d 531; *Boehm* v. *United States*, 8 Cir., 123 F.2d 791, 807-808.

[7] 46 Georgetown L.J. 180, note; 67 Yale L.J. 674.

and popular misunderstanding of the opinion in the *Jencks* case, as shown by decisions referred to in the Legislative History, pages 1864-1868, which had led to the unnecessary disclosure of irrelevant government reports and interfered with the prosecution of criminal cases by the United States.

The new Act[5] provides in substance that no statement or report in the possession of the United States which was

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[5] 18 U.S.C. §3500.

"§3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctnes of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably

made by a Government witness to an agent of the Government shall be the subject of discovery or inspection until the witness has testified on direct examination in the trial of the case; and that after he has testified the court, on motion of the defendant, shall order the United States to produce any statement of the witness in its possession which relates to the subject matter of his testimony. If the United States claims that any such statement contains matter which does not relate to the subject matter of the testimony, the court is required to order the United States to deliver the statement for the inspection of the court *in camera*, and thereupon the court is required to excise the irrelevant portions and to deliver the balance of the statement to the defendant for his use. If in such case the defendant is convicted, the entire text of the statement must be preserved by the United States and, in the event of an appeal, must be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. If the United States elects not to comply with an order of the court to deliver any such statement to the defendant, the court is re-

required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595."

quired to strike the testimony of the witness from the record and proceed with the trial, unless the court in its discretion determines that the interest of justice requires that a mistrial be declared.

The second trial of the pending case, now before us on appeal, took place after this statute was passed and the judge complied with its provisions when the defendant demanded the production of the reports of the Government witnesses for his inspection. The Government delivered the entire reports to the judge with the request that certain portions indicated therein should be excised by the judge *in camera* on the ground that they did not relate to the testimony of the witnesses. The judge complied with this request, examining all the reports and excising such portions as in his opinion did not relate to the testimony, and thereupon delivered the balance of the reports to the defendant. The defendant concedes that the judge complied with the statute but contends that the Act is unconstitutional since it did not fully comply with the requirements of due process laid down in the *Jencks* decision.

Through some misunderstanding as to the defendant's wishes the original unexcised reports of the Government witnesses were not sent to this court with the record on appeal but at the defendant's request the Government has now made them available to this court, as required by the statute, and they are now in our possession. We have examined them to determine the correctness of the rulings of the trial judge and we concur in his finding that the excised portions of the reports did not relate to the subject matter of the testimony of the witnesses. It remains to pass on the contention of the defendant that the new Act is unconstitutional.

In our opinion the *Jencks* decision does not require this conclusion and we hold the Act to be valid. It must be borne

in mind in the first place that the position of the Government in the pending case is not the same as it was in *Jencks*, so that the Supreme Court has not yet passed on the specific question now before this court. In *Jencks* the Government objected to the production of any part of the reports on the ground that inconsistency with the testimony had not been shown, and the court sustained the objection. It was this ruling that the Supreme Court passed upon, holding that the entire reports should be produced for the inspection of the defendant's attorney so that he might offer the whole or such parts of them in evidence as he thought wise, whereupon it would become the duty of the trial judge to decide whether the reports should be admitted or certain parts thereof eliminated as immaterial or irrelevant. In other words, the Court did not pass upon the question, which arises under subsection (c) of the new statute, of what is to be done when the United States claims that a particular statement ordered to be produced contains some matter which does not relate to the subject matter of the testimony. In any event, it is our opinion that this statutory provision, whether it be regarded as an addition to or a change in the *Jencks* procedure, does not amount to a denial of the due process required by the Fifth Amendment but is merely a procedural regulation which preserves certain substantial rights of the accused and at the same time protects the Government files from the danger of unnecessary disclosure of its sources of information.

Most significant is the fact that the new statutory procedure does not deny the defendant access to any information which would be helpful to his case. Production of the reports for inspection does not depend upon the permission of Government custodians or the attorneys for the prosecution; and the determination of what portions of the re-

ports should be excised is not left to the Government but is entrusted to the impartial and experienced judgment not only of the trial judge but also the judges of the appellate courts and the Justices of the Supreme Court themselves, if in their discretion they determine to review the case. The standards set by *Jencks*, 353 U.S. at 669, that justice requires no less than that the defense be entitled to see the reports to determine what use may be made of them is satisfied; and justice requires no more.

The defense is denied only the opportunity to be heard on the question whether the excised portions of the reports bear on the testimony of the witnesses; and this does not amount to a denial of due process. It does not interfere with any constitutional right to which the defendant is entitled but merely restricts his examination of the Government files which he desires to make, not because he has any reason to believe that they will yield anything helpful to his case but on the chance, which costs him nothing, that something will be turned up that will weaken the prosecution. In this situation it is clearly within the province of Congress to protect the right of the United States to withhold facts which it has gathered and to shield the sources of its information in the public interest so long as no pertinent information is withheld from the defendant. This can be done only by entrusting the determination of relevancy to someone other than the parties to the cause, and the method devised by Congress is obviously fair both to the Government and to the defendant and represents a reasonable exercise of Congressional power. In the *Jencks* decision the Supreme Court was not dealing with constitutional questions. It was exercising what is described in *McNabb* v. *United States*, 318 U.S. 332, 440, 441, "its supervisory authority over the administration of criminal justice in the United States * * *

by the establishment of civilized standards of procedure and evidence"; and Congress, by the passage of the interstitial legislation contained in §3500 was merely exercising its concurrent power in the same field to provide for a case that the Court did not envisage.

The conclusion that the provisions of the new statute were not violative of the constitutional rights of the defendant is supported by the decision of the Second Circuit in *United States* v. *Gandia, et al.*, decided May 15, 1958, 255 F.2d 454, where it was held that the defendants were not entitled to have their convictions vacated under 28 U.S.C. 2255 merely because the trial judge, having inspected the reports made by a Government witness and finding them not to be inconsistent with the witnesses' testimony, denied the defense access to them. The court said that in the *Jencks* case the Supreme Court did not hold that constitutional considerations entitled defendants access to witnesses' reports but announced only an evidentiary rule to be followed in the trial of criminal cases in the United States courts. See also *United States* v. *Angelet*, 255 F.2d 383; *United States* v. *Spangelet*, 2 Cir., 27 L.W. 2063; *United States* v. *Procter & Gamble Co.*, 356 U.S. 672; *United States* v. *Consolidated Launderies Corp.*, S.D., N.Y., 159 Fed. Supp. 860.

Impaneling of Grand Jury

Finally, the defendant makes the contention that the indictment is invalid because the grand jury was illegally impaneled. The method of selecting jurors was that the Deputy Clerk of the District Court and the Jury Commissioner sent out a number of form letters to reputable citizens requesting them to furnish a list of persons available for jury duty. The letters were sent, amongst others, to superintendents of

public schools, bank presidents, sheriffs, and the chairmen of the Republican and Democratic Parties in the counties in the district. In response tthe court officials received a list of names and addresses from which they eliminated those persons whom they deemed unfit on the basis of personal knowledge and those who appeared from the inspection of the list to be unsuitable. For example, those listed as physicians were stricken. The names were then placed in the jury box and when the time came to select the jury for a term of court the names of fifty-six persons were drawn at random from the box and summoned for jury service. The reverse side of the summons contained a questionnaire covering the qualifications of the jurors and when the returns came in they were checked to ascertain whether the persons summoned were qualified under the jury statute, 18 U.S.C. §1861. When the prospective jurors appeared in answer to the summons, the names of fifty-six qualified persons were put in a hat from which nineteen were drawn by lot and they became the grand jury, the rest forming the petit jury panel. The jurors were then questioned by the judge as to their payment of taxes for the previous two years and any litigation pending before the court, and whether they had any reason to be excused. A grand jury selected in this manner found the indictment on which the pending case was tried.

It does not appear from the evidence that any qualified person or class of persons was excluded from jury service or that any disqualified person served on the grand jury chosen in this case or that the defendant was in any way prejudiced by the procedure. It is, nevertheless, contended that the grand jury was illegally impaneled, since the panel did not consist of persons whose names were "publicly drawn from a box containing the names of not less than

three hundred qualified persons at the time of each drawing." It is said that the jury officials did not comply with the statute because they did not make sufficient investigation of the persons on the list before their names were put in the box and hence the prosecution must fail even though the defendant was not prejudiced, since the injury in such case affects the jury system and the community at large. See *Ballard* v. *United States*, 329 U.S. 187, 195; *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F.2d 414; *United States* v. *Dennis*, 2 Cir., 183 F.2d 201; *Walker* v. *United States*, 8 Cir., 93 F.2d 383; *Dunn* v. *United States*, 6 Cir., 238 F.2d 908; *United States* v. *Silverman*, D.Conn., 129 F.Supp. 496. A motion to dismiss the indictment on this ground was filed but it was denied by the judge who held that the selection of the grand jury did not involve any substantial deviation from the requirements of the statute and that in any event the defect had been waived by the failure of the defendant to raise the point within a reasonable time.

We think that the motion to dismiss was properly denied. It clearly appears that the defendant not only suffered no prejudice but that he waived the point by failing to comply with the provisions of Rule 12 of the Federal Rules of Criminal Procedure. Section (b)(2) of the rule provides that defenses and objections based on defects in the institution of the prosecution or in the indictment may be raised only on motion before trial and that the motion shall include all such defenses and objections then available to the defendant and that the failure so to act constitutes a waiver thereof, although the court, for cause shown, may grant relief from waiver. The rule further provides that the motion shall be made before the plea is entered but the court may permit it to be made within a reasonable time thereafter. The de-

fendant did not comply with the provisions of this rule, as is shown by the following recital of facts.

He was indicted on November 18 and arraigned on December 7, 1954. At that time he declined court appointed counsel, secured a reduction in bail and a delay of the arraignment for one week to enable him to secure counsel of his own choosing. This period was subsequently extended to December 16. By that time the defendant had not secured an attorney and the court appointed counsel for the purposes of arraignment only. The defendant pleaded "not guilty," but notified the court that he reserved the right to make certain pre-trial motions, and the court granted a further delay until January 14, 1955. The defendant expressed complete satisfaction with the counsel who represented him on December 16.

On January 14, the defendant appeared with a New York attorney and requested an additional sixty days for the filing of motions and secured an order of the court permitting him to file such motions by February 18, with the right of the Government to reply on March 2, and a hearing of the motions on March 8. These dates were satisfactory to the defendant's attorney. On February 18, eight motions were filed but none of them attacked the grand jury. The hearing took place on March 8, at which the defendant was represented by a Washington attorney. By order of March 14 these motions were denied.

Subsequent, on March 15, the defendant filed the motion attacking the grand jury now under consideration. Evidence as to the method of selecting the jury was taken, a hearing was had and on April 15, as we have seen, the motion was denied. This ruling was entirely justified under

the terms of Rule 12, as interpreted by the authorities. The information on which the motion was based was at all times available to the defendant and yet he failed to take action despite liberal extensions of time. See *United States* v. *Silverman*, 129 F.Supp. 496, 513; *Nations* v. *United States*, 8 Cir., 52 F.2d 97, 99; *Agnew* v. *United States*, 165 U.S. 36, 44; *United States* v. *Thompson*, 2 Cir., 144 F.2d 604; *Wright* v. *United States*, 8 Cir., 165 F.2d 405; *Notes of Advisory Committee*, fol. Rule 12, F.R. Crim. Pro., 18 U.S.C., p. 206.

Accordingly, the judgment of the District Court is

Affirmed.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitution of the United States:

1. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

2. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Statutes

1. 18 U. S. C. Section 2385 (the Smith Act):

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the

government of any political subdivision therein, by force or violence, or by the assassination of any officers of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

2. 50 U. S. C. Section 783 (Section 4 of the Internal Security Act of 1950):

(a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government,

foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * *

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

* * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

3. 50 U. S. C. Sections 841 and 843 (the Communist Control Act of 1954):

Section 841. The congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through the public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchial chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any avail-

able means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

Section 843. (a) Whoever knowingly and willfully become or remains a member of (1) the Communist Party, (2) any other organization having for one of its purposes, or objectives the establishment, control conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with the knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

4. 28 U. S. C. Section 1861 (Qualifications of jurors):

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.*

5. 28 U. S. C. Section 1864 (Manner of drawing names of grand and petit jurors):

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

* * *

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

* * *

*Section 9.1 of the General Statutes of North Carolina states that a juror must be a person who resides in the county, who is over 21 years of age and who is "of good moral character" and has "sufficient intelligence to serve as a member of grand and petit juries." The statute excludes from any jury service all those "who have been convicted of any crime involving moral turpitude or who have been adjudged to be *non compos mentis*".

6. Public Law 85-269; 71 Stat. 595.

Chapter 223 of title 18, United States Code, is amended by adding a new section 3500 which shall read as follows:

"§ 3500. Demand for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such

withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) and (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Approved September 2, 1957.